TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 128.

GENERAL OIL COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN H. CRAIN, INSPECTOR OF COAL OIL, CARBON OIL, PETROLEUM, KEROSENE OIL, GASOLINE, &c., FOR THE COUNTY OF SHELBY AND CITY OF MEMPHIS, TENN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED OCTOBER 8, 1906.

(20,409.)

(20,409.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 444.

GENERAL OIL COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN H. CRAIN, INSPECTOR OF COAL OIL, CARBON OIL, PETROLEUM, KEROSENE OIL, GASOLINE, &c., FOR THE COUNTY OF SHELBY AND CITY OF MEMPHIS, TENN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1907.

a # 9, Shelby Chancery.

Chancery Court of Shelby County.

No. 13193.

GENERAL OIL CO.
vs.
JNO. H. CRAIN, Inspector of Oils.

Turley and Turley, Attorneys for Complainant.
Thos. H. Jackson, Attorney for Defendant.

Bill of Costs, $19.60.
T. B. CALDWELL, *C. & M.*

Filed Feb. 14, 1905.
JNO. W. BUFORD, *Cl'k,*
By J. E. SPINGBETT, *D. C.*

1 Chancery Court of Shelby County.

STATE OF TENNESSEE, *Shelby County:*

Be it Remembered, That at a term of the Chancery Court of Shelby County, State aforesaid, began and held at the Court House in the City of Memphis, in and for said County, on Monday, the 3rd day of October, 1904, the same being the first Monday in October, 1904, present and presiding the Hon. F. H. Heiskell, Chancellor of said Court, the following proceedings were had, to-wit:

"Original Bill Filed" November 19th, 1904.

13193.

GENERAL OIL CO.
vs.
JOHN H. CRAIN, Inspector of Coal Oil and Other Oils for the County of Shelby and State of Tennessee.

To the Hon. F. H. Heiskell, Chancellor:

Complainant respectfully shows to the Court, that it is a corporation organized and existing under the laws of the State of Tennessee with its situs and principal place of business in the City of Memphis, Shelby County and State of Tennessee. That the defendant is a resident of Shelby County, Tennessee, and is the duly and legally appointed, qualified and acting inspector of coal oil, carbon oil, petroleum, kerosene oil, gasoline, and other products of petroleum used for illuminating and burning fluids, for said Shelby County,

and the City of Memphis, having been appointed to said position by the Governor of the State of Tennessee, under and by virtue
2 of Chap. 349, of the Acts of 1899, of the Legislature of the State of Tennessee, which was approved by the Governor and became a law April 21st, 1899, and took effect from and after July 1st, 1899.

Complainant shows that it is and has been, for some time past, engaged in the manufacture, shipment and sale of coal oil, and other illuminating oils and fluids, in various States of the Union, That its wells, and refining and manufacturing plants are all located in the States of Pennsylvania and Ohio, and from these plants it ships its manufactured, and merchantable products to various States of the United States, in which the same are sold and used. That on account of the nature of such illuminating oils and fluids, and the tendency of the same to leak and evaporate, and their liability in case of change of temperature to burst the vessel in which they are contained, the usual, and in fact the only practicable, manner in which such oils and fluids can be shipped for long distances, is by means of what is known as tank cars, the same being the large metal tanks permanently fixed upon railroad cars. And complainant also shows, that on account of the nature of such oils, and of complainant's business, it is necessary to have distributing points for such oils, and fluids, in various places throughout the United States, at which points it may unload and receive the oil thus shipped in tank cars (which contain from five thousand to eight thousand gallons each) in order to place said oil in barrels, or other smaller vessels of a size suitable for filling such orders as complainant may receive, which vary in amounts from one barrel upward. Complainant shows that it is impossible in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay, and expense in the way of freight charges incident to such a plan, and for the further reason, that an extensive plant and apparatus is necessary, in order
3 to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil. Complainant shows that for some years past it has been engaged in business in the City of Memphis, Shelby County, Tennessee, and has made said City not only a place of business at which it sells oil to the citizens and residents of Memphis, and the State of Tennessee, but also one of its distributing points to which it has oil shipped from its wells and plants in Pennsylvania and Ohio, in railroad tank cars, from which said oil is unloaded at Memphis into various tanks, barrels and other receptacles for the purpose of being forwarded from that point to customers of complainant at various places in the States of Arkansas, Louisiana, and Mississippi.

And complainant shows, that in the course of its business it has many regular customers in said States from whom it always has on hand many unfilled orders for oil to be delivered as soon as possible or convenient.

Complainant shows, that at its place of business in Memphis, it now has numerous tanks or receptacles for oils, of various kinds and sizes, among which are the following:—

(1.) A tank or vessel in which complainant constantly keeps and will keep, and in which there now is, only oil for which orders have been received from customers of complainant in Arkansas, Louisiana, and Mississippi before said oil was shipped from complainant's plants in Pennsylvania and Ohio, and which was shipped especially to fill said orders. This oil is unloaded in Memphis from the railroad tank cars solely for the purpose of distribution into smaller vessels, or receptacles, to meet the requirements of said orders, and said oil is, and has always been kept wholly separate and distinct from all other oils and fluids of complainant in the State of
4 Tennessee, in a tank plainly and conspicuously marked "Oil Already Sold in Arkansas, Louisiana and Mississippi," and of course, complainant has sold, and will sell, none of this oil in the State of Tennessee, since the same has already been sold to customers in Arkansas, Louisiana and Mississippi; in fact this oil has remained and will remain in Shelby County, and the State of Tennessee, only long enough to be properly distributed, and reshipped, according to the orders therefor, whereupon it will proceed at once upon its journey to the various places in the State of Arkansas, Louisiana, and Mississippi, from which said orders were received. This will be only a few days.

(2.) In another tank or vessel, at its place of business in Memphis, complainant has now, and constantly keeps and will keep, only oil shipped from Pennsylvania and Ohio for sale in the States of Arkansas, Louisiana, and Mississippi, but for which complainant has no orders on hand from said States at the time of such shipments. This oil, as soon as it reaches Memphis in the railroad tank cars, is placed in said tank or vessel which is plainly and conspicuously marked "Oil to be sold in Arkansas, Louisiana and Mississippi," and is there kept wholly separate, and apart, from all other oil until required to supply orders received from complainant's Arkansas, Louisiana, and Mississippi customers; and complainant never sells or offers for sale any oil from this tank, except upon orders from Arkansas, Louisiana, and Mississippi, upon the receipt of which complainant ships said oil to the persons sending said orders. And complainant especially shows, that each of said two tanks, at the present time contains, and will hereafter contain, only oil as above described, unmixed with oil held for any other purpose, and that complainant has never placed in any of said tanks, any oil other than as
5 above described, nor has complainant ever sold, or offered to sell, oil from any of said tanks, except in the manner, and to the persons above mentioned. Complainant shows that the defendant, John H. Crain, Inspector of Oils as aforesaid, from time to time, inspects the oil and illuminating fluids of complainant in Memphis, charging and collecting for such inspection the regular fee of twenty five (25) cents per barrel, as provided by Section eight of the Act of 1899, above mentioned, and that complainant has fully paid such charges and inspection fees, up to the present time, upon

all of its oil shipped into Tennessee, whether intended for sale in this State, or in other States. Until quite recently, complainant has unloaded the greater portion of its oil from its railroad tank cars into its stationary tanks at Memphis, without attempting to separate the oil sold, or intended to be sold, in Arkansas, Louisiana and Mississippi from the oil sold, or intended to be sold, in Tennessee, and has, as stated, paid the inspection charges and fees on all of said oil. Complainant is now separating its oils in the manner described above, because it is advised, as will be hereafter more fully set forth, that the oil it has sold or intends selling outside of Tennessee, is not liable to inspection here, if kept separate from the oil sold, or intended to be sold in Tennessee. Complainant shows, however, that the defendant claims the right to inspect, and states that he intends to, and will inspect, all the oil now contained in the two tanks or vessles above mentioned, and enforce the payment of the charges and fees therefor, as soon as the same is placed into the barrels and vessels for shipment to complainant's Arkansas, Louisiana and Mississippi customers as above stated. And although the defendant sees, knows and admits, that complainant never makes sales from either of said tanks, except to persons in Arkansas, Louisiana, and Mississippi, in the manner above set out, still he claims, and insists, that
6 all of said oil in said tanks, and in fact, all coal oil, and other illuminating fluids, situated in Shelby County, are subject to inspection, under the Act of Tennessee above mentioned, and that he, as coal oil inspector, is not only entitled, but is also required by said Act, and the laws of the State of Tennessee, to inspect all such oil, whether the same is to be sold to residents of the State of Tennessee, or to the residents of other States, or is already sold to the latter at the time of its importation into Tennessee. And said defendant states that he is determined to continue to inspect all such oil as the complainant may in the future bring into said State, including the oil that may be placed in said tanks for sale, and use as above stated, and that he is also determined to collect of complainant the regular fees of such inspection. Complainant is advised and shows, that none of the oil now contained in either of said two tanks, or to be placed therein, is subject to inspection, and that the defendant Crain has no right, or power, to inspect any of said oil, or to charge, or collect, fees for such inspection, for the following reasons:

(1.) The Act of 1899 above mentioned, and the laws of the State of Tennessee, provide for and intend, the inspection only of such oil as is manufactured in Tennessee, or sold, or offered for sale, to persons or for consumption in said State; and neither said Act of 1899, nor any other Law of the State of Tennessee, provides expressly or by intendment for the inspection of oil brought to Tennessee from another State, kept separate from all other oil while in the State of Tennessee, intended at the time of its shipment to Tennessee for sale in other States, and finally sold in other States. Complainant calls attention especially to the language of Section 1, of the Act of 1899, which provides for the appointment of an inspector of illuminating fluids "which may be manufactured or *or* offered for

sale in the State"; and complainant shows, that none of its
7 oil of any kind is manufactured in the State of Tennessee,
and none of the oil in the two tanks above mentioned is sold, or offered for sale in said State. In the Second Section of said Act, it is provided, "That it shall be the duty of the inspector promptly to inspect or test all illuminating oils or fluids which are subject to inspection, as provided in this Act, within the City or County for which he is appointed"; Complainant shows that this adds nothing to the scope of Section 1, last quoted, for the reason that only Oils Manufactured or offered for sale in the State of Tennessee, are "subject to inspection". Complainant further calls attention to the language of Section 4, of said Act, as follows "Be it further enacted, that if any person, manufacturer, or dealer, shall sell to *any person whatever in the State*, any of said illuminating oils and fluids, before first having the same inspected as provided in this Act, he shall be guilty of a misdemeanor &c." Complainant submits that this language shows clearly, that the Legislature intended to provide for the inspection only of such oil as should be sold to residents of the State of Tennessee or for consumption in said State.

Complainant further shows, that, from an examination of said Act, it is clearly apparent that the same was intended solely for the benefit, and protection, of the citizens and residents of the State of Tennessee, and that on this account, it was never intended by said Act to provide for an inspection of coal oil or illuminating fluids, which were not to be sold in said State, and with which the citizens and residents thereof could have no dealing, or connection. And complainant shows especially in this regard, that the States of Arkansas, and Louisiana both have laws for the inspection of such illuminating fluids, enacted for the protection and benefit of their
citizens and residents, and covering all such fluids sold or
8 offered for sale, in said States; and that these laws makes no
exception from their requirements in favor of oil previously inspected in other States, nor do the laws of said States, nor their inspectors, in any way recognize the inspection of the Tennessee authorities; hence, so far as the protection of the citizens of these other States is concerned, it is not only unnecessary to inspect said oil in Tennessee, but such inspection thereof imposes upon the complainant the double expense of two inspections of the same oil. The State of Mississippi has no inspection Laws for such oils and fluids, and complainant submits that it was not the intention of the Legislature of Tennessee by said Act, to provide for the protection of citizens and residents of a State which has no such provision in its own laws; certainly the Legislature did not intend to force upon the citizens of Mississippi the inspection of such oils and fluids. Clearly it can not be contended that the Act of 1899, above mentioned, either expressly or by implication, or intendment, provides for the inspection of the oil contained in the first tank, or vessel, mentioned above, that is, the oil already sold to customers in Arkansas, Louisiana, and Mississippi before the same is shipped to Memphis from complainant's plants in Pennsylvania and Ohio; for not only is this oil not manufactured or sold in the State of Tennessee, but it is also true

that none of said oil is kept or offered in Tennessee, "for sale" in any State whatever, for the reason that the same is already sold before being shipped to Tennessee.

(2.) As hereinbefore stated, complainant is advised, believes and charges, that the Act of 1899, does not provide in terms, nor was it intended by said Act, to provide for the inspection of any oil in the situation and condition of that contained in either of said two tanks, and complainant submits that this is a proper construction of the terms and intention of said Act. If, however, the Court should reach the conclusion that said Act, when properly construed,
9 provides for the inspection of the oil in said two tanks, and that the Legislature of Tennessee intended by said Act, to require the inspection of such oil, then complainant is advised and shows the Court that said Act, if so construed, is unconstitutional, in so far as it provides for, or requires, an inspection of any of the oil in said tanks, because such inspection would be a regulation of and an interference with commerce between the States of Pennsylvania and Ohio, from which said oil was shipped, and the States of Arkansas, Louisiana and Mississippi, to which the same was shipped, in violation of the Constitution and Laws of *of* the United States, and especially of the third clause of Section 8 of Article I, of the Constitution of the United States, which provides that Congress shall have power, "To Regulate Commerce With Foreign Nations, and among the several States, and with the Indian Tribes."

Complainant now shows in this regard, that all of the oil contained in the two tanks above mentioned, during the time the same is in the State of Tennessee, is properly the subject of interstate commerce, and the shipment and transportation thereof during all of said time, is commerce among the several States, for the reason that all of the said oil is shipped from the States of Pennsylvania and Ohio, and that at the time of such shipment, the intended destination of the oil so shipped is the States of Arkansas, Louisiana and Mississippi, and that all of said oil is eventually carried to said States and sold therein. And complainant shows that at no time while said oil is within the State of Tennessee does it become commingled with other property in said State, nor in any way lose its identity and character as interstate commerce. Complainant recognizes the right of the State of Tennessee, in the exercise of its police
10 power, to enact reasonable inspection laws for the protection and benefit of its own citizens at home, and the protection and benefit of the reputation, in foreign markets, of such of its manufactured products as may be shipped from said State. Complainant shows, however, that said Act of 1899, and the inspection thereunder, if held to affect and apply to, any of the oil contained and to be placed in said two tanks are not a valid exercise of the police power of the State of Tennessee, and to that extent said Act is unconstitutional and void, because:—

(1.) None of said oil is sold in Tennessee, and none of it is manufactured in Tennessee; hence, the inspection thereof is unnecessary to protect either the residents, and citizens of Tennessee, or the reputation of her manufactured products abroad;

(2.) The fees provided by said Act of 1899, and collected by the defendant, and other inspectors of the State of Tennessee, are unreasonable, and exorbitant charges, for the services performed in making such inspection, and are very much greater than necessary to provide for the expenses of such inspection, so that there is paid into the Treasury of the State of Tennessee, under Section 13, of said Act many thousands of dollars annually, as a surplus remaining on hand after the payment of salaries of the coal oil inspectors of the State of Tennessee, and all other expenses incident to the execution of said inspection laws. Complainant then shows and charges that for the reasons stated said law, in so far as it affects any of the oil contained in said two tanks, not only interferes to an unnecessary and unreasonable extent with commerce between the States, but is also absolutely unnecessary from any stand point, and is therefore unconstitutional and void.

(3.) If however, said act should be construed to apply to
11 any of the oil in either of said tanks, and if complainant should be mistaken as to the character of any of said oil, as interstate commerce, complainant is still advised and charges, that said Act, in so far as it affects any of said oil, is unconstitutional and void, under the Constitution of the State of Tennessee, because the inspection of said oil is in no way necessary or conducive to the benefit of the State of Tennessee, or the citizens thereof, or their health, morals or safety; and an Act providing for such inspection is therefore unnecessary, unreasonable and not a valid exercise of the police power of the State, but is a mere tax or charge imposed under the guise of a police regulation, and as such is in conflict with article 2, Sec. 28, of the Constitution of Tennessee, which requires all property to be taxed according to its value, and that taxes be equal and uniform throughout the State. In spite of the facts above set forth and of the further fact, that complainant has paid all taxes, and inspection fees, upon the rest of its oils, in the State of Tennesee, and is willing to continue to pay all such taxes and fees as may be legally required of it, the defendant still insists upon inspecting the oil in said two tanks, and expresses his intention of making such inspection as soon as said oil is placed in barrels, and other vessels for shipment. Complainant further shows, that the Act of 1899, above mentioned, provides in Sec. 2, a heavy penalty, consisting of a fine from twenty to fifty dollars, for each offense, against any dealer or manufacturer of oils, or fluids, who shall obstruct an inspector in the discharge of his duties, or refuse to permit him upon his premises for the performance thereof; and said Act further declares in Sec. 4, that it shall be a misdemeanor for any person to sell any of said illuminating oils and fluids before first having the same inspected as provided in said Act, and on conviction he shall be fined any
sum not exceeding three hundred ($300.00) Dollars, and the
12 oil and fluids, if found to be rejected, shall be forfeited and sold. Complainant shows therefore, that while it is advised and believes as hereinbefore set out, that defendant has no legal right or power to inspect any of the oils contained in said two tanks, still, on account of the severe penalties mentioned, complainant

cannot afford to take the risk of selling any of the oil in said tanks, without inspection, nor can it afford to take the risk of refusing to permit the inspection of said oil, nor of that to be placed in said tanks in the future. And complainant further shows that on account of the fact, that said Act of 1899, purports to impose said inspection fees merely to cover the expense of making such inspection, and not as a tax, it is doubtful whether the same, even if paid under protest, could afterwards be recovered by complainant. And even if the same could, in any way, be recovered, after being paid to said defendant, or turned over to the State Treasury, it would be necessary for complainant to bring suit every thirty days for the charges and fees paid with- the preceeding thirty days, so that an indefinite number of suits would be necessary.

For the reasons above stated, complainant shows, that it is without adequate remedy, or relief at law against the illegal and unauthorized action threatened by the defendant, and that unless this Court will restrain the defendant by its process of injunction, from carrying out his intentions as h-reinbefore set forth, complainant will suffer irreparable injury.

Complainant further shows, that the inspection fees and charges which would accrue on its oil in the two tanks mentioned above for a period of twelve months, if said oil was subject to inspection, would amount to not more than the sum of ($2500.00) twenty five hundred dollars.

13 The premises considered, the complainant prays that the said John H. Crain, inspector of coal oil and other oils, for the County of Shelby and State of Tennessee, may be made a party defendant hereto; that copy and process may issue commanding him to appear and answer, or otherwise defend this suit, at some rule day to be named in the process, but his answer under oath is expressly waived.

Complainant prays further, that an injunction may issue in its favor, restraining the said defendant, John H. Crain, inspector of coal oil as aforesaid, from inspecting or attempting to inspect the oil contained in the two tanks men- in the body of the bill, which oils, as stated, are not intended for sale, or use in the State of Tennessee, and that he may be further restrained from attempting to collect any charges or inspection fees from the complainant, on account of said oils, or from interfering with complainant in any way with the sales and reshipment of said oils.

Complainant prays further that on the final hearing the Court will adjudge that said oil contained in said two tanks, and all of the oils belonging to complainant which are brought through Memphis for the purpose of sale, use and delivery in States outside of Tennessee, are not liable to inspection under the laws of Tennessee. Complainant prays further, that said writ of injunction asked for above may also prohibit the said defendant from inspecting any other oils hereafter to be put into said tanks, and intended solely and exclusively for sale, use, and delivery in Arkansas, Louisiana, and Mississippi; or other States outside of Tennessee. And complainant prays for all such further relief, general and special, as may be

meet and proper in the premises. This is the first application for a writ of injunction or other extraordinary process in this case.

TURLEY AND TURLEY,
Sols. for Complainant.

14 STATE OF TENNESSEE, *Shelby County:*

M. W. Wilbourn, being duly sworn, makes oath that he is the manager of the General Oil Company at Memphis, Tennessee. That he has knowledge of the matters stated in the foregoing bill, and that the statements contained in said bill are true, to the best of his knowledge and belief.

M. W. WILBOURN.

Subscribed and sworn to before me, this Nov. 18, 1904.
[SEAL.] L. D. SMITH,
Notary Public.

Fee due L. D. Smith, N. P., $1.00.

Cost Bond.

We, The General Oil Company as principal, and Thos. B. Turley, as surety; acknowledge ourselves indebted to John H. Crain, Inspector of Oils &c., in the sum of Two Hundred and Fifty Dollars, to be void if the said General Oil Company, Complainant in a bill which has this day been filed in the Chancery Court of Shelby County against the said John H. Crain, Inspector &c. shall pay such costs as may be awarded against it by the Court in its decrees and orders in said cause.

This 19th day of November A. D. 1904.

THE GENERAL OIL COMPANY,
By TURLEY & TURLEY, *Att'ys.*
THOS. B. TURLEY (*Surety*).

15 *"Demurrer of John H. Crain."*

Filed Nov. 19th, 1904. T. B. Caldwell, C. & M.

In the Chancery Court of Shelby County, Tennessee.

13193.

GENERAL OIL COMPANY
vs.
JOHN H. CRAIN, Inspector of Coal Oil, &c., for Shelby County, Tennessee.

The bill alleges that complainant is a corporation, organized under the Laws of the State of Tennessee, having its situs and principal place of business in the City of Memphis, Shelby County, Ten-

nessee, it alleges that this oil is brought into the City of Memphis in a locomotive tank, or what is sometimes called a car tank; permanently fixed upon rail-road cars, That on arrival of said car tank in Memphis, the contents or the oil therein is drawn out of said tank car, and placed into a stationary tank, from which it is subsequently drawn out and placed into barrels and then forwarded to its customers in the States of Arkansas, Louisiana and Mississippi.

(1.)

This demurrant says, that under and by virtue of the Acts of the General Assembly of the State of Tennessee, Chapter 349 Acts of 1899, it is made his duty to inspect all such oils as set out in the bill, that are offered for sale in the State of Tennessee. That said bill shows on its face that said oil is offered for sale in said State by a corporation organized under the Laws of Tennessee, and having its principal office and place of business in Shelby County, Tennessee, and the fact that said oil is delivered to common carriers by complainant in Tennessee, to be delivered by them to its various customers who reside out of Tennessee, does not exempt such oil from payment of the regular inspection fees.

16 (2.)

Demurrant says, that the separation of said oil from that which complainant intends to sell to citizens of Tennessee by placing it in a separate tank and only filling such orders therefrom as were sold by complainant to citizens of other States, before the arrival of the oil in Memphis, does not exempt it from being inspected by complainant nor from the payment of inspection fees.

(3.)

Demurrant further says, that the marking of said tank "Oil already sold in Arkansas, Mississippi and Louisiana" and the placing therein only such oil as complainant has already contracted to deliver to its customers in such States and the distribution by the complainant of said oils into smaller packages and then the reshipment of the same to its various customers in said States, does not exempt it from inspection and the payment of inspection fees.

(4.)

Demurrant further says, that the marking of said tank "Oil to be sold in Arkansas, Louisiana and Mississippi," and the placing therein only such oil as is intended for sale to citizens of said States, and not to the citizens of Tennessee, does not exempt it from inspection and the payment of the regular inspection fees.

(5.)

Demurrant says that said Act is not unconstitutional, as an interference with interstate commerce, or commerce between the States of Pennsylvania and Ohio, from which said oil is shipped and the States of Arkansas, Louisiana and Mississippi to which said
17 oil is shipped, for the reason that, the bill shows that the original package, namely: the "car tank" is broken at

Memphis and the contents taken out and placed into a stationary tank and from thence distributed into smaller packages and forwarded to its customers in said States. That said oil has become commingled with the other property of this State and has lost its identity and character as interstate commerce. That interstate commerce protects only the original package.

(6.)

Demurrant says, that the allegation in the bill that more money is collected by the inspector in inspection fees than is necessary to pay the cost of such inspection does not render the Act unconstitutional. The same is a valid exercise of the police power of the State.

(7.)

Demurrant further says, that Section 2 of said Act requires him to brand all oil "rejected" that will not stand a flash test of 120 degrees Fahrenheit offered for sale, and that this applies to all oil offered for sale for illuminating purposes, whether the same is sold by a citizen of Tennessee to citizens of Arkansas, Louisiana and Mississippi or to citizens of the State of Tennessee. That as a matter of law the offering by a resident citizen of Tennessee to supply oil to citizens of Arkansas, Louisiana and Mississippi for a consideration, from its place of business in Tennessee, although the orders for said oil are received before the oil arrives in the State of Tennessee and where the original package is broken for distribution after it arrives in Tennessee, is a sale, or an offering for sale in Tennessee.

18 Demurrant says, for the reasons above stated, there is no equity in said bill, and the same should be dismissed.

(8.)

This Court has no jurisdiction to hear and determine this cause, for the reason that it is suit against the State, or against an officer of the State, acting by authority of the State, with a view to reach the State, its treasury, funds or property, said cause should therefore be dismissed.

THOS. H. JACKSON,
Sol. for Demurrant.

"Decree on Demurrer and for Appeal."

Entered Jan'y 10th, 1905, M. B. 125, Page 107.

13195, R. D.

GENERAL OIL COMPANY
vs.
JOHN H. CRAIN, Inspector, etc.

This cause came on to be and was heard this day, upon the application made by the complainant, the General Oil Company, in its original bill, for a preliminary injunction against the defendant,

John H. Crain, inspector of coal oil and other oils for the County of Shelby and State of Tennessee, restraining the said defendant, John H. Crain, from inspecting certain oils mentioned in said bill. And said application being heard by the Court, was granted, and it was ordered and decreed by the Court that the said defendant John H. Crain, inspector of coal oil &c., as aforesaid, be enjoined from inspecting, or attempting to inspect, the oils contained in
19 the two tanks mentioned in the body of said bill, and such oils as may hereafter be put into said tanks, and which are already sold, or intended solely and exclusively for sale and use in Arkansas, Louisiana and Mississippi, and other places outside of Tennessee; and that the said defendant, John H. Crain, inspector as aforesaid, be further enjoined and restrained from attempting to collect any charges or inspection fees from complainant, on account of any of such oil, and from interfering with complainant, in any way in respect to the sales and reshipment of said oils. And it was further ordered and decreed by the Court that in lieu of giving bond for such preliminary injunction, the complainant, the General Oil Company be required to pay into the registry of the Court in this cause, the regular inspection fees prescribed by law, upon all such oil as may now be in said two tanks mentioned in the original bill, and such oil as may hereafter be placed in said tanks pending this suit, and that the sums so paid in for the oil now contained in each of said tanks, and the oil hereafter to be placed therein, be properly identified and kept separate by the clerk; and the whole amount thus paid in, to be retained in this cause, subject to the final orders of the Court; and the payment into Court, by the said complainant, is made a condition upon which the preliminary injunction so granted may be retained. And in order that the correct amount of such fees may be determined, pending this suit, it is further ordered, adjudged and decreed that the defendant, John H. Crain, inspector of oil as aforesaid, be given the right at all times, to inspect said tanks, and the oil contained therein, for the purpose of determining the quantity of such oil. And thereafter the defendant John H. Crain, inspector etc., having filed his demurrer to the bill herein, and having moved the Court to dissolve said preliminary injunction granted upon said bill, the said demurrer and motion came on to be, and was fully argued and heard; And it is ordered, adjudged and decreed by the Court
20 that the said demurrer be, and the same is hereby overruled as to that part of the bill in reference to the first tank mentioned in said bill, viz: the tank marked "Oil already sold in Arkansas, Louisiana and Mississippi," and as to that part of the bill in reference to the oil now contained in said tank and such oil as may be hereafter placed therein. And the motion to dissolve the preliminary injunction heretofore granted herein, is overruled and disallowed, in so far as the same covers and affects the said tank, and the oil now contained therein, and to be hereafter placed therein; that is, all such oil as has already been sold to purchasers outside of Tennessee, before said oil is brought to Tennessee. To

which action of the Court in overruling said demurrer and motion, the defendant John H. Crain, inspector as aforesaid, excepts.

And it is further ordered, adjudged and decreed by the Court, that the said demurrer of defendant, John H. Crain, be, and the same is hereby sustained, as to all that part of the bill in reference to the second tank mentioned in said bill, viz:—the tank marked "Oil to be sold in Arkansas, Louisiana and Mississippi" and the oil now contained in said tank, or to be hereafter placed therein; that is; such oil as is not already sold in other States than Tennessee, but is held in Tennessee for sale in other States, and all parts of complainant's bill in reference to said second tank and the oil now therein, and to be placed therein are hereby dismissed. And as to said second tank, mentioned in said bill, and the oil now contained therein, or hereafter to be placed therein, it is therefore also ordered and decreed that the preliminary injunction heretofore granted herein, be, and the same is hereby dissolved. To which action of the Court in sustaining said demurrer, and dismissing the bill as to said tank and oil, and dissolving said injunction, the complainant the General Oil Company excepts.

21 And from so much and such parts of the foregoing decree as overrules his demurrer as to those allegations, and that part of the bill in reference to the first tank therein mentioned, and the oil now contained therein, and from so much and such parts of said decree as overrule his motion to dissolve the preliminary injunction as to said tank and oil, the defendant, John H. Crain, inspector as aforesaid, prays an appeal to the next term of the Supreme Court of Tennessee, to be held at Jackson, Tennessee, on the first Monday in April, 1905. And the Court being of opinion that said appeal is proper at this time, grants the same, upon said defendant giving bond as required by law.

And from so much and such parts of the foregoing decree as sustain the said demurrer to those allegations, and that part of the bill in reference to the second tank mentioned in said bill, and the oil contained therein, and to be hereafter placed therein, and dismiss that portion of his said bill; and from so much of said decree as dissolves the preliminary injunction as to said tank and oils the complainant, the General Oil Company, prays an appeal to the next term of the Supreme Court of Tennessee, to be held at Jackson, Tennessee, on the first Monday in April, 1905, which appeal is granted by the Court, upon complainant giving bond as required by law; and it is further ordered, that pending said appeals, the said preliminary injunction shall remain in full force and effect.

And it is further ordered, adjudged by the Court, that pending said appeals, and as a condition to the allowance thereof, the complainant the General Oil Company shall continue to permit the defendant, John H. Crain, to inspect and ascertain the quantity of oil contained in said two tanks, and shall continue to pay into Court the fees required by law, for the inspection of such oil.

22 *Appeal Bond.*

Filed 14th Day of Jan'y, 1905. T. B. Caldwell, C. & M.

We, The General Oil Company, appellant, and surety, Thos. B. Turley, acknowledge ourselves indebted to John H. Crain, Inspector of Coal Oil etc. in the sum of Two Hundred and fifty ($250.00) Dollars. To be void if the said General Oil Company above named appellant which has prayed for and obtained an Appeal from the Decree of the Chancery Court of Shelby County, in a cause in which said General Oil Company is Complainant and said John H. Crain Inspector, &c., is Defendant, to the next term of the Supreme Court of Tennessee, for the District of West Tennessee, to be held at Jackson, Madison County, on the first Monday in April next, shall pay all such costs as shall be awarded against it by said Supreme Court.

This 13th day of January, 1905.

THE GENERAL OIL COMPANY, [SEAL.]
By TURLEY & TURLEY, *Att'ys.* [SEAL.]
THOS. B. TURLEY. [SEAL.]

"Amendment to Decree."

Entered Jan'y 26th, 1903, M. B. 125, page 162.

This cause came on to be further heard before the Hon. F. H. Heiskell, Chancellor, etc., when it is ordered by the Court that the decree hereinbefore entered on Jan'y 10th 1905, in Minute Book 125 at page 107, be and the same is hereby amended by adding thereto the matters in the succeeding paragraph and the same is so ordered, adjudged and decreed. It is ordered, adjudged and decreed
23 by the Court that the 8th ground of the demurrer, which is to the jurisdiction of this Court, be and the same is overruled as to the oil in both tanks, mentioned in the bill, and the defendant John H. Crain, inspector, prays an appeal from the ruling of the Court upon the 8th ground of demurrer, to the next term of the Supreme Court of Tennessee, to be held at Jackson, Tennessee, and the Court grants the same upon the condition hereinabove set out as to giving bond.

And it is further ordered that this amendment be entered as a part of said decree of Jan'y 10, 1905, and *nunc pro tunc.*

Appeal Bond.

Filed 3rd Day of Feb'y, 1905. T. B. Caldwell, C. & M.

We, John H. Crain, Inspector of Oil &c. appellant, and surety, James L. McRee, acknowledge ourselves indebted to General Oil Company appellees in the sum of Two Hundred & fifty Dollars. To

be void if the said Jno. H. Crain, Inspector &c., and others above named as appellants who have prayed for and obtained an Appeal from the Decree of the Chancery Court of Shelby County, in a cause in which General Oil Co. is Complainant and Jno. H. Crain Inspector &c. Defendant, to the next term of the Supreme Court of Tennessee, for the District of West Tennessee to be held at Jackson, Madison County, on the first Monday in April next, shall pay all such costs as shall be awarded against him by said Supreme Court.

This 3rd day of Febr'y, 1905.

JOHN H. CRAIN, *Inspector,* [SEAL.]
By THOS. H. JACKSON, *Att'y.*
By J. L. McREE. [SEAL.]
JAS. L. McREE, *Surety.* [SEAL.]

24 STATE OF TENNESSEE, *Shelby County, ss:*

I, T. B. Caldwell, Clerk and Master in Chancery Court of Shelby County, do hereby certify that the foregoing 45 pages contain a full, true and perfect transcript of all the proceedings had in a certain cause, lately pending herein, wherein General Oil Company is Complainant, and John H. Crain Inspector etc. Defendant, as the same appears on record and on file in my office.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court, at office in Memphis, this 27 day of Jan'y, A. D. 1905.

T. B. CALDWELL,
Clerk and Master,
[SEAL.] By W. M. COX, *D. C. & M.*

25 In the Supreme Court of Tennessee, at Jackson, April Term, 1905.

GENERAL OIL COMPANY, Complainant,
vs.
JOHN H. CRAIN, Inspector of Coal Oil and Other Oils for the County of Shelby and State of Tennessee, Defendant.

27 Shelby Chancery Docket.

Statement of Case, Assignment of Errors, Brief, and Argument.

For the Complainant, the General Oil Company.
Turley & Turley, H. J. Livingston, Jr., Solicitors.

Filed, April 25, 1905.

JOHN W. BUFORD, *Clerk,*
By J. E. SPRINGBETT, *D. C.*

26 In the Supreme Court of Tennessee, at Jackson, April Term, 1905.

GENERAL OIL COMPANY, Complainant,

vs.

JOHN H. CRAIN, Inspector of Coal Oil and Other Oils for the County of Shelby and State of Tennessee, Defendant.

27 Shelby Chancery Docket.

Statement of Case, Assignment of Errors, Brief and Argument for the Complainant, The General Oil Company.

Statement of the Case.

This suit raises the question of the right of the Coal Oil Inspector at Memphis to inspect certain oil belonging to the complainant, the General Oil Company.

The original bill, filed November 19, 1904, in the Chancery Court of Shelby County shows that the complainant is a Tennessee corporation with its situs and principal place of business at Memphis; that the defendant, Crain, is a resident of Shelby County, and is the duly appointed, qualified and acting inspector of coal oil and other illuminating and burning fluids for said county and the city
27 of Memphis, having been appointed to said position by the Governor of the State of Tennessee under and by virtue of Chapter 349, of the Acts of 1899, of the Legislature of Tennessee.

The bill shows that the complainant is engaged in the manufacture, shipment and sale of coal oil and other illuminating oils and fluids in various States of the United States. That its wells and refining and manufacturing plants are all located in the States of Pennsylvania and Ohio, and from these plants it ships its manufactured and merchantable products to various States in which they are sold and used. That on account of the nature of such illuminating oils and fluids, their tendency to leak and evaporate, and their liability in case of change of temperature to burst the vessels in which they are contained, the usual, and in fact the only practicable manner in which such oils and fluids can be shipped for long distances is by means of "tank cars," consisting of large metal tanks permanently fixed upon railroad cars. The bill shows that each of these tank cars contain from five to eight thousand gallons of oil, while complainant's orders and sales vary in amount from one barrel upward and are scattered over large territory. Furthermore an extensive plant and apparatus is necessary in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impossible to have such apparatus and machinery at every point to which complainant ships oil. For these reasons, and because of the great delay and expense in the way of freight charges incident to such a plan, it is impossible in the coal oil business, such as complainant carries on, to fill separately each order directly from

these railroad tank cars; but it is absolutely necessary to have distributing points at various places throughout the United States, where complainant may unload and receive its oil from these tank cars and then place the same in barrels, or other vessels, of a size suitable for filling its orders.

28 The bill further shows that for some years past complainant has been engaged in business at Memphis, and has used that city not only as a place of business where it sells oil to the citizens and residents of Memphis, and the State of Tennessee, but also as one of its distributing points, to which it has oil shipped from its wells and plants in Pennsylvania and Ohio, in railroad tank cars, from which said oil is unloaded at Memphis and placed into various tanks, barrels, and other receptacles, for the purpose of being forwarded to complainant's customers at various places in the States of Arkansas, Lousiana and Mississippi. And complainant alleges that in the course of its business it has many regular customers in said States, from whom it always has on hand unfilled orders for oil to be delivered as soon as possible or convenient.

The bill further shows that the complainant has at its place of business in Memphis numerous tanks or receptacles for oil, of various kinds and sizes, among which are two described in the bill as follows:

"(1.) A tank or vessle in which complainant constantly keeps, and will keep, and in which there now is, only oil for which orders have been received from customers of complainant in Arkansas, Louisiana, and Mississippi, before said oil was shipped from complainant's plants in Pennsylvania and Ohio, and which was shipped especially to fill said orders. This oil is unloaded in Memphis from the railroad tank cars solely for the purpose of distribution into smaller vessels, or receptacles, *the* meet the requirements of said orders, and said oil is, and has always been, kept wholly separate and distinct from all other oils and fluids of complainant in the State of Tennessee, in a tank plainly and conspcuously marked 'Oil already sold in Arkansas, Louisiana and Mississippi,' and, of course,

29 complainant has sold, and will sell, none of this oil in the State of Tennessee, since the same has already been sold to customers in Arkansas, Louisiana and Mississippi; in fact this oil has remained, and will remain, in Shelby County, and the State of Tennessee, only long enough to be properly distributed, and reshipped, according to the orders therefor, whereupon it will proceed at once upon its journey to the various places in the States of Arkansas, Louisiana and Mississippi, from which said orders were received. This will be only a few days."

"(2.) In another tank or vessel, at its place of business in Memphis, complainant has now and constantly keeps and will keep, only oil shipped from Pennsylvania and Ohio for sale in the State of Arkansas, Louisiana and Mississippi, but for which complainant has no orders on hand from said States at the time of such shipments. This oil, as soon as it reaches Memphis in the railroad tank car, is placed in said tank or vessel, which is plainly and conspcuously marked 'Oil to be sold in Arkansas, Louisiana and Mississippi,'

and is there kept wholly separate and apart from all other oil, until required to supply orders received from complainant's, Arkansas, Louisiana, and Mississippi customers; and complainant never sells or offers for sale any oil from this tank, except upon orders from Arkansas, Louisisana and Mississippi, upon the receipt of which complainant ships said oil to the persons sending said orders."

"And complainant especially shows that each of said two tanks at the present time contain, and will hereafter contain, only oil as above described, unmixed with oil held for any other purpose, and that complainant has never placed in any of said tanks, any oil other than as above described, nor has complainant ever sold, or offered to sell, oil from any of said tanks, except in the manner, and to the
30 persons above mentioned."

Tr., pp. 6-8.

These tanks will be hereinafter referred to as Tank No. 1 and Tank No. 2.

The bill shows that the defendant, John H. Crain, in his official capacity, from time to time inspects the oils and illuminating fluids of complainant in Memphis, charging and collecting for such inspection the regular fee of twenty-five cents per barrel, as provided by section 8 of the Act of 1899 above mentioned, and that complainant has heretofore fully paid such charges upon all of its oil shipped into Tennessee, whether intended for sale in this State or elsewhere. That until quite recently complainant has unloaded the greater portion of its oil from the railroad tank cars into its stationary tanks at Memphis, without attempting to separate the oil sold, or to be sold, in Arkansas, Louisiana and Mississippi from that sold, or intended for sale, in Tennessee. But that it is now separating its oils in the manner above described because it is advised that the oil already sold or intended for sale outside of Tennessee is not liable to inspection under the Tennessee law, if kept separate from the oil sold, or intended for sale, in said State.

The bill then charges that none of the oil now contained in either of said tanks, or to be placed therein hereafter, is subject to inspection under the Tennessee law, and that the defendant, Crain, has no right or power to inspect any of said oil, or to collect fees for such inspection for the following reasons:

(1.)

Because none of said oil is covered by the language or intention of Chapter 349 of the Acts of 1899, which is the present coal oil inspection law of Tennessee.

31 The bill quotes various parts of said act for the purpose of showing that the language used does not expressly cover the oil in question; and further contends that an examination of the act clearly shows that it was intended solely for the protection and benefit of the citizens of Tennessee, and on this account it was never intended by said act to provide for an inspection of oil which was not to be sold in Tennessee, and with which the citizens of that State could have no dealing or connection.

And the bill especially shows in this regard that the States of Arkansas and Louisiana both have laws for the inspection of such illuminating fluids, enacted for the protection of their own citizens, and covering all such fluids sold or offered for sale in said States; and that these laws make no exception from their requirements in favor of oil previously inspected in other States, nor do the inspectors of said States in any way recognize the inspection of the Tennessee authorities; hence, so far as the protection of the citizens of Arkansas and Louisiana is concerned, it is not only unnecessary to inspect said oil in Tennessee, but such inspection, in fact, imposes upon complainant, and its oil sold in said States, the double expense of two inspections of the same oil.

The bill shows that the State of Mississippi has no inspection laws for such oil, but charges that it was not the intention of the Legislature of Tennessee, by the act of 1899, to provide for the protection of the citizens of a State which makes no such provision by its own laws; that is, the Legislature did not intend to force upon the citizens of Mississippi an inspection of the oil to be consumed by them.

For the above reasons, the bill charges that the act of 1899 does not provide, either in terms or by intendment, for the inspection of any of the oil in question.

32 (2.)

If, however, said Act, when properly construed, provides for the inspection of the oil in either of said tanks, then said Act, in so far as it had that effect, is unconstitutional and void, because a regulation of, and interference with, interstate commerce in violation of the third clause of section 8, Article I, of the Constitution of the United States. And the bill charges in this regard that all of the oil contained in said tanks, during the time it is in the State of Tennessee, is properly the subject of interstate commerce, and the shipment and transportation thereof is commerce between the States of Pennsylvania and Ohio, from which said oil is shipped, and the States of Arkansas, Louisiana and Mississippi, into which it is finally carried.

The bill further charges in this regard that said Act of 1899, if held to affect and apply to any of the oil in said tanks, cannot be sustained as a valid exercise of the police power of the State of Tennessee:

(*a*) Because none of said oil is sold in Tennessee, and none of it is manufactured in Tennessee; hence, the inspection thereof is wholly unnecessary to protect either the residents and citizens of Tennessee, or the reputation or her manufactured products abroad.

(*b*) Because the fees provided by said Act of 1899 are unreasonable and excessive, and very much greater than necessary to provide for the expenses of such inspection. So that there is annually paid into the treasury of the State, after the payment of all salaries and expenses a surplus of many thousand of dollars, which is diverted to other uses.

(3.)

If said Act of 1899 be construed to apply to any of the
33 oil in said tanks, and complainant should be mistaken as to the character of any of said oil as interstate commerce, still said act is unconstitutional and void, in so far as it affects any of said oil, under the Constitution of the State of Tennessee, because the inspection of this particular oil is in no way necessary *to* conducive to the benefit of the State, or its citizens, or their health, morals or safety, since they have no connection with or interest in said oil. Therefore an Act providing for the inspection of said oil is unnecessary and unreasonable as a police measure, and is a mere tax or charge imposed under the guise of a police regulation; and as such, is in conflict with Article II, section 28, of the Constitution of Tennessee, which requires all property to be taxed according to its value, and that taxes shall be equal and uniform throughout the State.

The bill further charges that in spite of the facts above set forth, and in spite of the fact that the defendant Crain knows and admits that complainant never makes sales from either of said tanks except to persons in Arkansas, Louisiana and Mississippi, in the manner above mentioned, and in spite of the fact that complainant has paid all taxes, and inspection fees upon the rest of its oils in the State of Tennessee, the said defendant still contends that all of the oil contained in said two tanks is subject to inspection under the laws of Tennessee; and insists that he has the right, and that it is his duty, to inspect said oil, and states that he is determined to inspect the same and collect the regular fees therefor; and avers that he is about to make such inspection.

The bill shows that, on account of the heavy criminal penalties provided by said Act of 1899 against any dealer or manufacturer
who shall obstruct a coal oil inspector in the discharge of his
34 duties, or sell any oil without first having the same inspected, complainant cannot afford to take the risk of selling any of the oil in said tanks without inspection, or of refusing to permit the inspection of said oil, or that to be hereafter placed in said tanks. Furthermore, since said Act purports to impose said inspection fees merely to cover the expenses of inspection, and not as a tax, it is doubtful whether the same, even if paid under protest, could afterwards be recovered by the complainant; and if such payments could in any way be recovered, suit would have to be brought every thirty days for fees paid within the preceding thirty days, thus necessitating an indefinite number of suits. For these reasons the bill alleges that complainant is without adequate remedy at law against the illegal and unauthorized action threatened by defendant, and without injunctive relief will suffer irreparable injury.

The prayer of the bill is for preliminary and perpetual injunctions, restraining the defendant from inspecting any of the oil now contained in said two tanks, or to be placed therein hereafter; and from attempting to collect any inspection fees upon said oil, or interfering in any way with the sale and shipment of said oil. And for an adjudication that none of said oil, or of complainant's oil

brought through Memphis for sale, delivery and use outside of Tennessee, is subject to inspection under the laws of that State.
Tr., pp. 25-26.

The chancellor granted a preliminary injunction in accordance with the prayer of the bill; requiring the complainant, in lieu of injunction bond, to pay into court the amount of the regular inspection fees upon the oil contained, or thereafter to be placed, in said tanks, pending this suit, this fund to await the decision of the cause; and giving the defendant the right to examine said tanks at will for the purpose of determining the quantity of such oil.
Tr., pp. 35-37.

35 *Demurrer of Defendant.*

Thereupon the defendant demurred. The grounds of demurrer need not be stated at length. It clearly raises the question of the legal sufficiency of the bill, and contends:
1. That the bill shows upon its face that all of the oil contained, and to be placed, in said two tanks, is subject to inspection under the Tennessee laws; and that none of the matters stated in said bill exempt any of said oil from such inspection.
2. That none of said oil is interstate commerce while in Tennessee in said tanks, because the original package, to-wit, "car-tank" is broken at Memphis, and the oil contained therein is thus commingled with the other property of Tennessee, and loses its character as interstate commerce.
3. That the alleged excessiveness and unreasonableness of the inspection fees does not render the Act unconstitutional.
4. That the allegations of the bill show both a sale, and an offering for sale, of said oil in Tennessee.
5. That the court has no jurisdiction of the cause, because the same is, "A suit against the State or against an officer of the State, acting by authority of the State, with a view to reach the State, its treasury, funds or property."
Tr., pp. 29-34 1-2.

The defendant also moved to dissolve the preliminary injunction previously granted.
Tr., p. 37.

36 The chancellor overruled the last ground of demurrer (denying the jurisdiction of the court) as to the oil contained, and to be placed, in both of said tanks.
Tr., p. 43.

And further overruled all other grounds of demurrer as to those parts of the bill in reference to the oil contained, and to be placed, in Tank number 1 above mentioned, marked "Oil already sold in Arkansas, Louisiana and Mississippi," holding that such oil is not legally subject to inspection; and disallowed the motion to dissolve the preliminary injunction as to such oil.

From all the above the defendant prayed an appeal, which the court allowed.

Tr., p. 33.

As to the oil contained, and to be placed, in Tank Number 2, marked "Oil to be sold in Arkansas, Louisiana and Mississippi," the chancellor sustained those grounds of the demurrer claiming that this oil was subject to inspection under the Tennessee law; dismissed all parts of the bill in reference to such oil, and dissolved the preliminary injunction in that regard.

From this action of the court, the complainant appealed.

Tr., pp. 34-41.

Assignments of Error.

I.

The chancellor erred in sustaining defendant's demurrer as to those allegations, and that part of the bill in reference to the
37 oil contained, or to be thereafter placed, in the second tank mentioned in said bill, being the tank marked "Oil to be sold in Arkansas, Louisiana and Mississippi"; in holding such oil legally subject to inspection and the payment of fees therefor; and in dismissing the allegations of the bill in that regard.

II.

The chancellor erred in dissolving the preliminary injunction as to the oil contained, and to be placed, in said tank.

The chancellor should have held:

(1.) That said oil is not covered by the language or intention of the Act of 1899.

(2.) That said oil is interstate commerce while in Tennessee, and therefore not subject to inspection.

(3.) That, in any event, no inspection of said oil is necessary or proper as a police regulation; hence the imposition of a charge for such inspection is a mere tax or penalty, and as such in conflict with Article II, Section 28, of the Constitution of Tennessee, requiring all property to be taxed according to its value, and that taxes be equal and uniform throughout the State.

Brief and Argument.

Inasmuch as the defendant Crain has appealed from that part of the chancellor's decree unfavorable to him, and is now assigning the same error, the whole case is before this court for determination *de novo*. Hence we will in this brief present our views upon all features of the case, as presented by the bill and demurrer.

38 I.

Has the Court Jurisdiction of this Suit?

This preliminary objection to the court's jurisdiction is based on section 4507 of Shannon's Code, which is as follows:

"No court in the State of Tennessee shall have any power, jurisdiction, or authority to entertain any suit against the State, or against any officer of the State acting by authority of the State, with a view to reach the State, its treasury, funds or property, and all such suits shall be dismissed as to the State or such officers, on motion, plea, or demurrer of the law officer of the State, or counsel employed for the State."

Obviously this does not apply to a suit like the present, which is not "against the State"; which is not brought "with a view to reach the State, its treasury, funds or property"; and in which it is charged that the defendant is not "acting by authority of the State."

A proceeding enjoining a sheriff and district attorney from collecting a void judgment in favor of the State against a revenue collector and his sureties, is not a suit against the State.

Fry *v.* Britton, 2 Heisk. 606.

A suit against a State officer in reference to any matter about which he is not acting by authority of the State, is not a suit against the State. For instance, a State officer may be enjoined from executing an unconstitutional act.

Lynn *v.* Polk, 8 Lea 121.

In the above case (which is conclusive of this question), Judge Turney, delivering the opinion of the Court, said:

"I am compelled to confess my utter incompetency to comprehend the reasoning upon which it has been holden that unconstitu-
39 tional enactments may be, or must be, treated as authority of the State. To my mind, it is the climax of absurdity."

8 Lea, 131.

II.

Does the Tennessee Inspection Law Provide Expressly or by Intendment for the Inspection of Oil in the Situation of that in these Tanks?

In construing the language of said act and in arriving at the intention of the Ligislature, we must of course consider the purpose of the coal oil inspection laws. In the first place, as we shall show hereafter, if indeed it be not conceded, inspection laws can be properly enacted for only two purposes (1) To protect the residents and citizens of the State enacting such laws, and (2) To protect the reputation of said State and its products, or manufactures, in foreign markets. We submit that not only will it be presumed that the Legislature of Tennessee enacted its coal oil inspection laws for proper purposes as above indicated, but an examination of said law also shows beyond a doubt that it was enacted solely for the protection of the citizens of Tennessee; and that therefore it cannot be construed to cover this oil, with which citizens of Tennessee have no connection or concern.

Section 1 of the Act of 1899 provides as follows:

"That the Governor shall appoint for each city or county in this

State containing a population of one thousand and over, an inspector of coal oil, carbon oil, petroleum, kerosene oil, gasoline or other product of petroleum used for illuminating or burning fluid, by whatever name known, which may be manufactured or offered for sale in the State."

Section 2 provides:

"That it shall be the duty of the Inspector promptly to
40 inspect or test all illuminating oils or fluids which are subject to inspection as provided in this act, within the city or county for which he is appointed."

Section 4 provides:

"That if any person, manufacturer or dealer shall sell to any person whatever in the State any of the said illuminating oils and fluids before first having the same inspected as provided in this Act, he shall be guilty of a misdemeanor."

Section 10 provides:

"That when oils specified in Section 9 of this Act are sent from other States for consumption in this State for illuminating purposes to counties in this State without an Inspector, and the oils are inspected in transitu, and condemned as of less flash test than 120 degrees Fahrenheit, the inspector is authorized and directed to ship back said oils to the shippers of the oil." * * * "And all packages or barrels containing the fluids which are plainly marked by the manufacturers or shippers 'nap-tha,' 'benzine,' 'gasoline,' together with the specific gravity of the fluids, may be permitted to go forward to their destination as not intended for illuminating purposes, but all barrels or packages of fluids without a flash test, and which are not branded or plainly marked as aforesaid by the manufacturers or shippers, shall be considered as intended for illuminating purposes, and shall be shipped back in like manner as condemned oil."

These are the only portions of the Act which indicate what oil was intended to be inspected. It is very clear from Section 1, that the inspection was intended to be confined to oils "Manufactured or offered for sale in the State." It is true that Section 2 provides for the inspection of all illuminating oils or fluids which may be
41 "Subject to inspection as provided in this Act." But, inasmuch as Section 1 provides an Inspector only of such oil as may be "Manufactured or offered for sale in the State," the inevitable construction is that the language of Section 2 last quoted refers only to the oil already thus described by Section 1. In other words, Section 2 adds nothing to the scope of Section 1, but refers to the same oil. If any confirmation of this construction be necessary, it appears in Section 4 above quoted, which provides a penalty for the sale of uninspected oil only in case the sale is made "To any person whatever in the State."

The most natural construction of the words last quoted is that they mean a person residing in Tennessee; but however that may be, it is certain that the sale must be made "In the State," and the purchaser must be at least temporarily in Tennessee before the seller is guilty of a violation of the Act. Furthermore, it seems reasonably certain that the Act of 1899 intended the inspection only of such

oil as is sold for consumption in Tennessee. For we see from the language of Section 10, above quoted, that this is expressly stated in regard to the inspection of oils shipped into counties having no inspectors. It is only when such oils are shipped into said counties "For consumption in this State for illuminating purposes," that they may be rejected and returned to the shippers. The Act further provides, in Section 10, that any amount of gasoline, nap-tha, etc., may be brought into and kept in the State without inspection, provided only it be not intended for illuminating purposes; this shows conclusively that the inspection provided by the Act is intended to guard only against danger in the consumption and use of oil, and not in its mere presence or sale in the State.

Even if the above be not the proper construction of the Act, still it seems clear that "Offered for sale in the State," as used in
42 Section 1, does not mean "offered in the State for sale" in Arkansas, Louisiana or Mississippi; but said language means that the sale is to be completed by delivery in Tennessee. Of course, this construction of the language is more than strengthened when we consider the fact that the purpose of the Act is the protection of citizens of Tennessee, and to construe it otherwise would be to assume that the Legislature by accident or inadvertence passed a law from which the citizens of Tennessee would not receive the benefit.

Now, if the correct construction of the said Act be as above stated, to-wit, that it applies only to oil manufactured in Tennessee or offered for sale and delivery in Tennessee, then it is very clear that none of the oil in either of said tanks is covered by said Act. For the bill shows that none of said oil is manufactured in Tennessee; and while it may be true that the oil in tank No. 2 is "offered in Tennessee for sale," still none of said oil, when the sales thereof have been completed, will be in Tennessee, so that such sales will not be "sales in the State," as provided by section 1 of said Act. By no construction can it be held that said Act, by language or intendment, applies to the oil in tank No. 1; for not only is said oil not manufactured or sold in Tennessee, but it is also clearly true as held by the chancellor, that it is not even "offered for sale" after it reaches Tennessee, nor indeed, after it leaves the refineries. For the bill expressly states that said oil is all sold before it is shipped from Ohio and Pennsylvania.

That the above construction of said Act is the only reasonable and practical construction is further shown by the statement of the bill to the effect that Arkansas and Louisiana both have inspection laws of their own, and that the officials of those States do not
43 recognize the Tennessee inspection. If we attribute to the Legislature of Tennessee the altruistic desire and intention of protecting the citizens of Arkansas and Louisiana by having their coal oil inspected, we must pay the Legislature this compliment at the expense of our opinion of the good sense of that body; for we see that the practical effect of this solicitude for the residents of these other States is to impose upon their coal oil, and indirectly upon them, the expense of two inspections instead of one.

Even if, as suggested by the demurrer, the technical place of sale

of this oil be Tennessee, this would not affect the construction of the Act as a practical law.

Before passing from the question of the proper construction of the Tennessee statute we must call attention to the case of Coffin *v.* State, 2 Lea 559, in which the coal oil inspection law of 1877, which was in many respects similar to the present law, was construed by the Supreme Court of Tennessee. There it was held that:

Coal oil and other illuminating fluids manufactured or offered for sale in this State are subject to inspection under the Acts of March 24, 1875, and March 22, 1877, and to sell said fluids or oils in this State without inspection is a misdemeanor, whether sold for consumption in the State or elsewhere.

This case as reported is not full as to the facts, but enough appears to clearly differentiate it from the case at bar. As appears from the syllabus above quoted it was held to be a misdemeanor "To sell said fluids or oils in this State, without inspection." On pages 561 and 562 it is said that the defendants "sold certain barrels of said oils in Shelby County to a party living in Mississippi, to be consumed there, without first having the same inspected, as required by this Act." Again, on page 565, it is said that the terms of the statute "includes all sales in the State to any person." From the above excerpts it is clear that the sale was actually made in that case in Tennessee, and that purchaser, while a non-resident, was actually present in Tennessee when the sale was made; and it seems likely that the oil was delivered to him in Tennessee. The only defense was upon the ground that the oil, although sold in Tennessee, was to be consumed elsewhere. This, of course, was a "Sale in the State," and a very different case from shipping oil to a customer in Arkansas, Louisiana or Mississippi upon his order, as is done with oil from tank No. 2. In the Coffin case there was nothing to prevent the purchaser from changing his mind, and reselling or consuming said oil in Tennessee.

44

On page 564 of said case, it is also stated that it is the duty of the Inspector to proceed with his inspection at once; "He must of necessity inspect all oils and fluids kept for sale for illuminating purposes because it would be impossible to determine which package should be inspected and which omitted, as it could not be known in advance which were to be sold to residents and which to non-residents."

In that case, then, there was no separation of the oil to be sold to non-residents. The reasoning of the court is that it was the duty of the Inspector to inspect all oil as soon as received; since this was not done, the offense of the dealer was complete when he made a sale "in the State." Inasmuch as the oil in the case at bar which is to be sold to non-residents is separated from the other oil of complainant, it cannot be said that all of complainant's oil need be inspected, for it is not in this case "impossible to determine which package should be inspected, and which omitted," nor is it true that "it could not be known in advance which oil is to be sold to residents and which to non-residents." Thus it appears that in the case at bar

there does not exist the necessity for inspecting the oil in said
45 tanks that existed in the Coffin case above cited. Indeed, in concluding this portion of our brief we again call the attention of the court to the fact that there is absolutely no practical reason for inspecting the oil in said tanks, and it must be conceded that such inspection could not possibly serve any useful purpose; but on the contrary would be a wholly unnecessary burden upon complainant and its non-resident customers. If the Act of Tennessee be construed to apply to the oil in said tanks, it can only be done upon the idea that the letter of the statute covers said oil; which, as we have stated above, we do not think is the case. If there be any doubt about the proper construction of the language of said Act, we submit in all confidence that the natural inclination and disposition of the court will be to construe the same in such way as to make it reasonable and just inspection law, as it purports to be. Certainly the court, unless compelled by the language of the Act, will not presume that the Legislature intended, under the guise of an inspection law, to impose upon complainant a tax or charge which is wholly unnecessary from any standpoint, and in return for which complainant receives no consideration or benefit.

III.

If said act, when properly construed, provides for the inspection of the oil in said two tanks, then said act, to that extent, is unconstitutional and void, because such inspection would be a regulation of and an interference with interstate commerce, in violation of the Constitution of the United States.

Is the oil in said tanks while in the State of Tennessee the
46 subject of interstate commerce, and is the handling thereof during that time commerce among the several states?

It is, of course, conceded by the demurrer that all of said oil is produced in Pennsylvania and Ohio, and that at the time of its shipment from said States its ultimate destination is not the State of Tennessee, but the States of Arkansas, Louisiana and Mississippi.

It is well settled that the non-exercise by Congress of its power to regulate commerce among the States is equivalent to a declaration by that body that such commerce shall be free from any restriction. And the imposition of a tax on subjects of interstate commerce cannot be justified upon the ground that the taxation is equal and applies impartially to all goods of like character within the limits of such State.

Coe *v.* Errol, 116 U. S. 516;
Robbins *v.* Shelby County, 120 U. S., 499;
Leloup *v.* Mobile, 127 U. S., 640;
Asher *v.* Texas, 128 U. S., 129.

"The form or agency of a State tax is not to be considered upon the question of its constitutionality, but the subject upon which the burden is laid."

Coe *v.* Errol, 116 U. S., 516;
State Freight Tax, 15 Wall. 272.

As a general proposition, it is conceded that when goods start on their journey from State to State they become interstate commerce, and are protected from interference or regulation by any State through which they may pass until they reach their ultimate destination; notwithstanding on the way they may be delayed for a reasonable time on account of inadequate means of transportation, or for re-shipment, or assortment, or distribution, or on account of any accident, or any other cause which may intervene to pre-
47 vent the goods going directly from the initial point of shipment to the point of destination.

Coe *v.* Errol, 116 U. S., 517;
Kelley *v.* Rhoades, 188 U. S., 1;
State *v.* Engle, 5 Vroom (N. J.), 435;
State *v.* Carrigan, 10 Vroom (N. J.), 35;
The Daniel Ball, 10 Wall. 557.

"Goods on their way through a State from a place outside thereof to another place outside thereof, are in course of interstate, or foreign transportation, and are not taxable by the State through which they are passing, even though detained within that State by low water or other temporary causes."

Coe *v.* Errol, 116 U. S., 516.

Applying the above well settled principles to our case, it is very clear that the oil in Tank No. 1 during the whole of its stay in Tennessee is the subject of interstate commerce, for this oil is actually in transit from the time it leaves the States of Pennsylvania and Ohio until it is delivered to its owners in the States of Arkansas, Louisiana and Mississippi. The delay at Memphis is merely for the purpose of separation, distribution and re-shipment, and is no longer than is required by the nature of the business and the exigencies of transportation. The only difference between the oil in tank No. 1 and that in tank No. 2, is that the latter is not actually sold before being shipped from Pennsylvania and Ohio, and in a certain sense it is held in Tennessee awaiting sales in other States; but at the time of the shipment of this oil it is as certain that none of it is to be sold, or to remain, in the State of Tennessee, as in the case of the oil in tank No. 1; so that this oil in never really at rest in Tennessee, and its interstate transit is never finally ended at Memphis, but is only temporarily interrupted. We submit then that, under
48 the authorities above referred to, and under others hereinafter quoted, this oil during its stay in Memphis is equally the subject of interstate commerce, and as such, not subject to taxation or inspection in Tennessee.

We have had more difficulty than might have been anticipated in finding cases exactly similar to the one at bar, in which the question of interstate commerce was considered. We have, however, found a few, and will quote from those at some length, and also from others in which we think the same princ-ples were involved as in the case at bar.

The case of State *v.* Engle, 5 Vroom (N. J.), 425, is directly in

point, and if it is considered authority, seems conclusive of this question. In that case, a company owning coal lands in Pennsylvania sent coal mined on their lands, by railroad, to Elizabethport, in New Jersey, where it was deposited on the wharf for separation and assortment, for the purpose of being shipped in vessels to purchasers in New York and New England. It was held by the Supreme Court of New Jersey that this coal while at Elizabethport was the subject of interstate commerce and not subject to taxation by the State of New Jersey. We quote as follows from the opinion of the court:

"When a cargo of one size is obtained it is shipped to points in New England, or up the Hudson River, as soon as a vessel can be chartered to carry it. None of the company's coal is sold for consumption at Elizabethport." * * * "Orders from purchasers were generally obtained before the coal left the mines, and the sales were for delivery on board vessels at Elizabethport."

The court says this property was "delayed within the State, not for the purpose of sale, but merely for separation and assortment, for the convenience of shipping to its destination." * * * "That a tax on it is a tax on commerce among the States, is too plain to require argument."

The court further calls attention to the fact that if the State of New Jersey be permitted to impose a tax upon said coal, then
49 every State through which it passed would have an equal right to impose a similar tax, and thus commerce between the several States might be overwhelmed with the burdens of taxation. The applicability of the above to the case at bar is obvious. If the State of Tennessee has a right to inspect the oil in said two tanks while it is in transit from the States of Pennsylvania and Ohio to the States of Arkansas, Louisiana and Mississippi, then every State through which it passes would have the same right. The fact that Memphis is used as a point for distributing said oil to meet the requirements of the various orders for same in the States of Arkansas, Louisiana and Mississippi, in no way gives the State of Tennessee a superior right in regard to said oil over and above the right of the other States through which it passes. It is true that the oil may remain in Tennessee longer than in these other States; but in considering the question whether this oil is in course of transportation while in Tennessee, we must take into consideration the nature of the oil itself and of the coal oil business. The bill shows that on account of the nature of the oil and its tendency to leak and evaporate, it cannot be shipped great distances in barrels, but can only be shipped in railroad tank cars, and also that these cars can-ot be sent to every place where there may be an order for a small amount of oil. Thus, in the very nature of things, it is necessary that the oil be rehandled at some point. It is just as much in the course of transportation, and is just as much protected by the interstate commerce clause of the Constitution of the United States, while being so handled as while actually in motion toward its destination.

The case of State *v.* Carrigan, 10 Vroom (N. J.), 35, was in re-

gard to a similar state of facts as the case last mentioned, and the decision of the court was in all respects the same.

50 In the case of Kelley *v.* Rhoads, 188 U. S., 1, it was held that sheep driven at a reasonable speed from a point in Utah, across Wyoming, to a point in Nebraska—a distance of about five hundred miles, are properly engaged in interstate commerce so as to be exempt from taxation in Wyoming, even though it appeared that they subsisted during their journey by grazing along the way.

It will, of course, be contended by defendant that the charge imposed under the Tennessee inspection law is not a tax or an interference with interstate commerce, but is a mere inspection law enacted by the State of Tennessee in the exercise of its police power. We must, of course, concede the right of the State of Tennessee to enact reasonable inspection laws for the protection and benefit of its own citizens at home, and the protection and benefit of the reputation in foreign markets of such of its manufactured products as may be shipped from the State. But in order to be valid, a so-called inspection law must be such in fact, and must be enacted for the purpose, and must be calculated to accomplish the ends for which valid inspection laws may be enacted. And it is perfectly clear that the Tennessee Act of 1899, if construed to apply to any of the oil contained in said two tanks, is not a valid inspection law, and the inspection thereunder is not a valid exercise of the police power of the State of Tennessee, and to that extent said act is unconstitutional and void:

1. Because none of said oil is sold in Tennessee and none of it is manufactured in Tennessee. Hence the inspection thereof is unnecessary to protect either the citizens of Tennessee, or the reputation of her manufactured products abroad.

2. The fees provided by said Act are unreasonable and exorbitant, and very much greater than necessary to provide for the expense of such inspection, so that the Treasury of Tennessee

51 annually receives a large surplus therefrom, which is diverted to other purposes.

The mere fact that a State statute is enacted in good faith as an exercise of the police power, will not render it valid if it in fact amounts to a regulation of interstate commerce.

17 A. & E. Enc. Law, 75.

It is for the courts to determine what State action is, or is not, a regulation of interstate commerce.

Id., p. 75; citing:

Leisy *v.* Hardin, 135 U. S., 100.

A State statute will be construed, if possible, so as not to amount to an interference with interstate commerce.

Id., p. 76.

There are many cases where statutes broad enough to include both local and interstate commerce have been held to apply only to the former, because otherwise unconstitutional.

Id., p. 76.

Local police laws which may be enacted by the States have their course in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety. All State legislation regulating or affecting interstate commerce, must, in order to be valid, be enacted in pursuance of the police powers of the State.

Id., p. 56.

"It is a well settled rule, that if a State statute purporting to have been enacted in pursuance of the police power, to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the Federal Constitution.
52 A mere evasion of the right of Congress to regulate commerce will not be tolerated. A State may not, under cover of exercising its police powers, substantially prohibit or burden any foreign or interstate commerce."

Id., pp. 56-51; citing numerous cases.

"The reasonableness, or unreasonableness, of a State enactment, is always an element in the general inquiry by the court, whether such legislation encroaches upon national authority, or is to be deemed a legitimate exercise of the (police) powers of the State to protect the public interests, or promote the public convenience."

Lake Shore R. R. Co. *v.* Ohio, 173 U. S., 285.

A State law purporting to deal only with domestic matters, but being in effect and essence merely a regulation of interstate commerce, is void.

Hall *v.* De Cuir, 95 U. S., 485.

Neither the express declaration that a statute is passed in pursuance of the police power nor the actual good faith of the State in passing it as such, are material when the law is in fact an interference with interstate commerce.

Brennan *v.* Titusville, 153 U. S., 289;
Scott *v.* Donald, 165 U. S., 91.

A police regulation going beyond the necessities of the case and interfering with interstate commerce, is void.

17 A. & E., Ency. Law, p. 57;
Missouri R. R. Co. *v.* Haber, 19 U. S., 613;
Hannibal, etc. *v.* Husen, 95 U. S., 473.

Bona fide inspection laws are valid; but a statute or ordinance requiring the inspection of commodities in transit through the State or municipality and bound for points in other States, is void.
53 *Id.*, 79, citing Georgetown *v.* Davidson, 6 D. C. 278.

"Inspection laws to be valid must be such in fact, and have some material tendency to secure the ends for which inspection laws are enacted."

Id., p. 79.

"Where the inspection charge imposed is unreasonable, or excessive, it is void, as an interference with interstate commerce."
Id., p. 81.

A charge imposed for the express purpose of executing an inspection law, is void if the statute is not in fact a valid inspection law.
People *v.* Edye, 11 Daly (N. Y.), 132.

Inspection laws, like quarantine and sanitary laws, may be enacted by virtue of the police power of the States, and are governed by the same principles and restrictions.
In case of quarantine and sanitary laws, a state cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory.
17 A. & E., Enc. Law, p. 83; citing Hannibal *v.* Husen, 95 U. S., 465.

The case last above cited is a leading authority upon the subject of quarantine, inspection, and sanitary laws. In that case it was held that while a State may enact reasonable sanitary and inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering the State, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory.
Hannibal *v.* Husen, 95 U. S., 465.

"Since the range of a State's police power comes very near to the field committed by the constitution to Congress, it is the duty of the Courts to guard vigilantly against any needless in-
54 trusion."
Id., p. 465.

Speaking in that case, of the police power, Mr. Justice Strong said: "What that power is, it is difficult to define with sharp precision. It is generally said to extend to making legislation promotive of domestic order, morals, health and safety."
Id., p. 470.

In the case of Grimes *v.* Edye, 126 Mo., p. 168, it was held that a State could prohibit the importation of Texas cattle, because all Texas cattle are affected with or capable of imparting Texas fever; but that a State could not prohibit the shipment by rail through the State of such cattle, because in such case the danger of communicating the fever to native cattle is not sufficient to justify the prohibition of the Texas cattle.
This is much in point, as showing that a statute enacted under the police power of a State may be constitutional in a case where it is necessary, and unconstitutional where it is not necessary. In the case at bar, certainly there can be no danger to the citizens of Tennessee from the transportation through Tennessee of uninspected oil, and a statute requiring the inspection of such oil would be void because unnecessary.

A statute requiring all sheep brought into the State to be inspected and dipped, whether sound and healthy or not, is void as an interference with interstate commerce.

State *v.* Duckworth, 39 L. R. A., 365.

In Hannibal *v.* Husen, 95 U. S., 465, the absolute exclusion of all Texas cattle from Missouri at certain seasons of the year, was held to be an improper exercise of the police power, because going beyond the necessities of the case.

"Of course quarantine and health laws must have some
55 real relation to the objects named in them, in order to be sustained as valid exercises of the police power."

17 A. & E. Enc. Law, p. 83.

"If the prohibition is unnecessary to guard properly against the danger feared, it will be void as an interference with interstate commerce."

Id., p. 84.

It is a question for the court to determine, whether or not a prohibition extends beyond the danger to be apprehended.

Id., p. 84.

The police power is "founded upon the duty of the State to protect its citizens and provide for the safety and good order of society. It corresponds to the right of self-preservation in the indivi-ual."

22 A. & E., Enc. Law, 918.

The police power must be exercised subject to the provisions of both the Federal and State Constitutions.

Id., p. 937.

It cannot be used as a cloak for the invasion of personal rights or private property.

Id., 939.

The police power of a State is for the safety, health morals, comfort and welfare of its citizens. And it shall not arbitrarily and unreasonably affect the citizen in his life, liberty and property.

Harbison *v.* Knoxville Iron Co., 103 Tenn. p. 423.

For a long time the power of the States to inspect imports was doubted.

Turner *v.* Md., 107 U. S., p. 38.

But this power is now recognized.

"The object of the inspection laws is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and in relation to the articles designed for exportation, to
56 preserve the cha-cter and reputation of the State abroad."

Clintsman *v.* Nortrop, 8 Cowen, p. 46.

In Farris *v.* Henderson, 1 Oklahoma (33 Pac.) 381, it was held that an inspection law providing for an inspection of all stock

driven through Beaver County and a payment of so much per head for such inspection, was an unwarranted interference with interstate commerce, and void.

Most of the principles above stated are well settled, and we have cited them merely to show their applicability to the case at bar. From the authorities cited the following appears:

1. That the exercise of the police power can affect interstate commerce only so far as is absolutely necessary.

2. That the police power of the State, being identical with the right of self-defense, can be exercised only for the protection or benefit of the citizens of that State.

3. That inspection laws, being an exercise of the police power, must be intended for the protection or benefit of the citizens of that State, and must have some substantial relation to their safety, happiness or betterment.

4. If a so-called inspection law is not reasonably calculated to benefit the citizens of the State enacting it, it is void.

Inasmuch as none of the oil in tank No. 1 or tank No. 2, is manufactured in Tennessee, and none of it is to be sold or consumed in Tennessee, we do not see how the State of Tennessee or its citizens can be benefited by an inspection of said oil. Certainly, there is no necessity from their standpoint, for having it inspected. If, then, this oil, while in Tennessee, be the subject of interstate commerce, any interference with it by way of inspection is an unnecessary interfering by the State of Tennessee with interstate commerce, and the law providing for such interference, not being a valid exercise of the police power of that State, is unconstitutional and void.

57 The bill, however, further alleges that the charge for the so-called inspection is unreasonable and excessive. Since, as we contend above, the inspection is unnecessary, it follows that any charge on that account is excessive and unreasonable; *a fortiori* is this true of a charge which so greatly exceeds the amount necessary to defray the expenses of inspection that a large annual surplus remains on hand from the fees collected.

If, then, the oil in said tanks while in Tennessee is interstate commerce, it is undoubtedly true that it cannot be inspected under the Tennessee act. As bearing upon the question of its character as interstate commerce, we cite the following cases:

A case very much in point is that of Coe *v.* Errol, 116 U. S., 516, which is perhaps the leading case upon this subject in the United States Reports. In that case a petition was filed to abate certain taxes imposed upon logs by the State of New Hampshire. It appeared that the petitioners had cut large quantities of timber at various points in New Hampshire and collected the same near the town of Errol, intending to float the same during high water down the Androscoggin River to Lewiston, Maine. It also appeared that with these logs were a number of other logs cut at points in the State of Maine and thence floated down the lakes and rivers to Errol; that for many years the petitioner had carried on business in that way and the timber thus cut had always lain over one season, being

about a year, at said point in the Androscoggin River. It seems that the logs cut in Maine and those cut in New Hampshire were treated in practically the same way, all being collected at Errol, as an entrepot, all held there about the same length of time, and all shipped to Lewiston together.

The Supreme Court of New Hampshire held those logs
58 cut in New Hampshire taxable, but abated the tax as to those cut in Maine. This decision was affirmed by the Supreme Court of the United States, Mr. Justice Bradley holding that the New Hampshire logs had not begun their journey, and the mere intention to export them did not make them interstate commerce. Referring to these New Hampshire logs, he said: "This question does not present the predicament of goods in transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in course of commercial transportation and are already clearly under the protection of the Constitution."

Coe *v.* Errol, 116 U. S., p. 525.

This is particularly applicable to the case at bar, because in this case all of the oil in said tanks is merely shipped through Tennessee—that is, none of it started from Tennessee, and none of it comes to rest in Tennessee. It is, of course, well settled that mere intention, and even preparation, to export articles, does not make them the subject of interstate commerce; nor do they continue to be interstate commerce, so as to be exempt from all state interference, after they have come to rest at their final destination. But during their transportation from state to state, and while they are in any intermediate state in which there is no intention to finally stop them, as in the case of the Maine logs, they continue to be interstate commerce, even in spite of long delays.

Defendant contends by his demurrer that the oil in these tanks is not interstate commerce, and is, therefore, liable to inspection because not kept in the "original packages" in which it was brought into Tennessee; and opposing counsel cited many cases in the court
below in support of this proposition.

59 If the question of "original package" be material, it may be observed that in view of the nature of the coal oil business, this oil is as much in original packages as it is practicable to keep it. The fact is that in the ordinary course of business oil is not put up "in packages." The practical sense of the original package rule is to prevent a commingling of the article contained in the package *package* with the general mass of property in the State. This is accomplished in the case at bar as well as it can be accomplished in the practical oil business by placing the oil not to be used in Tennessee in the separate tanks mentioned.

But aside from this, we think the original package doctrine and the many cases upon that subject wholly inapplicable. The question here is, rather, whether the oil has reached its final destination,

or is still in course of transit so as to be interstate commerce. In all cases where the question of "original package" was considered it was conceded that the goods had reached the State of their ultimate destination; and the question was whether the goods in each case had lost their character as interstate commerce and become commingled with the mass of property of the State, so that a prohibition of their sale would not be an interference with interstate commerce. In the "original package" cases, of which Leisy *v.* Hardin, 135 U. S. 100, is one of the most noted, the United States Supreme Court held that goods brought into a State, if retained in the original package, could be sold in that State in spite of State prohibition. In certain other cases it has been held that sales of goods after the original package has been broken can be regulated or prohibited without violation of the interstate commerce laws.

The above doctrine, of course, has no application to a case where the goods never come to rest in the State and are not intended
60 for sale therein; nor has the court ever held that the breaking of the original package shows that the transit of the goods has ceased and that they are at rest at the point where such package is broken.

In the case at bar it is conceded that none of the oil in said two tanks will finally remain in Tennessee; the question is whether said oil while in Tennessee is in transit or at rest. With this question the original package doctrine has nothing to do; the question involved is rather analagous to those involved in the following cases hereinbefore cited:

1. Coe *v.* Errol, 116 U. S., 516.
2. Kelley *v.* Rhoads, 188 U. S., 1.
3. State *v.* Engle, 34 New Jersey Law, 425.
4. Caldwell *v.* North Carolina, 187 U. S., 622.
5. American Steel & Wire Co. *v.* Speed, 192 U. S., 500.

In all these cases the question was whether the goods were in transit or at rest. In the case of the logs in the first case and the sheep in the second the articles, of course, were not put in packages. In the third case mentioned the coal was brought into New Jersey in cars and then distributed; hence the original package was broken.

The case of Caldwell *v.* North Carolina, above cited, best shows the inapplicability of the original package doctrine; that was one of the so-called "sales by sample" cases, and the court held that the fact that in filling orders the pictures were brought into North Carolina in one package and the frames in another, and these two packages were then broken and the pictures and frames put together by the shipper's agent, did not deprive the transaction of the character of interstate commerce or render it taxable, because the goods were practically still in transit, and had not reached their destination at the time the packages were broken.

On the other hand, in the case of the Steel and Wire Co. *v.* Speed it was conceded that the goods were still in the original packages at the time they were taxed; but the court held them subject
61 to taxation because the proof showed that they had reached their final destination, and were held for sale in Tennessee.

Thus it is seen that the breaking of the original package has no bearing upon the question of interstate commerce involved in such a case as that at bar.

The following cases used before the chancellor will doubtless be presented here.

Counsel for defendant cited the case of Willis *v.* Standard Oil Co., 50 Minn. 290, as holding that "a statute that provides for the inspection of illuminating oil in railroad tank cars is valid." An examination of that case shows that the oil held liable to inspection was to be sold in the State, and the court expressly said that but for this said oil would have been interstate commerce and not subject to inspection. The lower court held that the oil not intended for sale in Minnesota was not subject to inspection, and this was approved by the Appellate Court. We quote from the opinion:

"The objection is also made that the law is in violation of the Con-
" stitution of the United States as an interference with interstate
" commerce. If it were applicable to the oil inspected while in tran-
" sit through the State and not intended for sale or use within it, the
" law so far as thus applicable would interfere with interstate com-
" merce. But we are to presume that the Legislature did not intend
" it to apply so as to interfere with the exclusive jurisdiction of
" Congress."

In the case of Patapsco *v.* Board of Agriculture, 171 U. S. 345, it was held that if an inspection charge be found so excessive as to justify the conclusion that the law was intended for revenue purposes, the act could not be sustained; though it was suggested that the question of excessiveness was perhaps for Congress. It was also held that valid inspection laws can be passed only to protect the com-
62 munity in case of domestic sales or to preserve the reputation of the State in case of exports. If the act has no relation to these objects it cannot be sustained.

171 U. S., 355.

The case of Pittsburg Coal Co. *v.* Louisiana, 156 U. S., 590, was cited below as holding that "a law requiring the *gua*ging of any coal or coke boat in any port of the State with a fee to the *gua*ger is not an unconstitutional regulation of commerce." But an examination of that case shows that under said act the *gua*gers were not required to *gua*ge any boat until "called upon for that purpose." * * * "The law also declared that no boat load of coal or coke should be sold in the city or State until it had been inspected as provided for in the act." The suit was to recover a penalty for selling a boat load of coal in New Orleans in violation of the act. Thus it appears that the act required the *gua*ging only of such coal as was sold in Louisiana, since there was no provision for a general inspection and the act provided a penalty only in case of sales in Louisiana. This being so, the State could, of course, pass the act as a valid exercise of its police power for the protection of its own citizens.

It is, perhaps, well to call the attention of the court to the case of American Steel and Wire Company *v.* Speed, which was recently before this court, in order to differentiate that case from the case at

bar. Without reciting the details of that case, we call attention to the following essential differences between that and the present case;

1. In that case there was never any separation of the goods sold, or to be sold, in Tennessee from those sold, or to be sold, in other States; so that any article kept on hand in the stock at Memphis was liable, under the company's custom of doing business, to be sold: (1) In Tennessee and (2) without any previous order or con-
63 tract. It necessarily followed, therefore, that each and every article in that stock had come to rest in Tennessee, in that it was held in Tennessee for an uncertain time, and might be sold in that State. Each article of that stock was as much a part of the "mass of property" of Tennessee, as if it had never been in any other State. Its transit has ceased as completely as if it had never been in transit. There was neither contract for, nor intention of, forwarding any particular keg of nails or coil of wire to any other State, or of using same to fill any special order.

In the case at bar, on the other hand, it is settled at the time of the shipment from Pennsylvania and Ohio of the oil in said two tanks that none of it will ever reach its destination in Tennessee, or be mingled with the "mass of property" in that State.

2. In the Steel and Wire case, while the proof showed that most of the company's goods were sold outside of Tennessee, and a considerable amount on what was called "previous contracts," still, as above stated, any article on hand might be sold to Memphis customers, and regular customers of the company could purchase without previous contract.

In our case, as above stated, none of the oil in either of the said tanks is sold in Tennessee.

3. In deciding the Steel and Wire Company case the Supreme Court of Tennessee reached the conclusion that inasmuch as any article might be sold in Tennessee and without previous order, therefore the whole stock might be considered as held for that purpose. (2 Cates 545.) With this we fully agree, but the mere statement of the decision shows that it does not apply to our case.

4. The Supreme Court of the United States, in affirming the decision of the Supreme Court of Tennessee in the Steel and Wire case, held that the goods in question had "arrived at their desti-
64 nation" and were "at rest" within the State, and were "enjoying the protection of its laws," and might therefore be taxed without discrimination, like other property within the State. 192 U. S., p. 500.

Of this we may say:

1. That, of course, the court could not have reached its conclusion unless it had found that the goods had arrived at their destination and were at rest within the State, which is not true of the oil in our case.

2. That the right of the State to tax does not necessarily give the right to inspect. A careful reading of the opinion of the Supreme Court of the United States shows that it nowhere held that interstate commerce in said goods has ceased at the time said tax was imposed.

In fact, it appears very clearly, from the opinion of the court, that if these goods had been imports from a foreign country, no tax could have been imposed upon them in their then condition. The decision of the court rests upon the ground that uniform taxation of those goods under those conditions was not a "regulation" within the meaning of that term, as used by Congress. This is reasonable, because, in return for the tax, these goods, as stated by the court, were "enjoying the protection of the State laws."

It certainly would not follow that an exorbitant charge for an unnecessary inspection would not be a "regulation" of commerce; for in return for the inspection fee the owner of the oil gets nothing of value to him, and from the inspection the people of Tennessee derive no benefit. This inspection, then, being unnecessary, is unreasonable, and is an unwarranted interference with commerce.

65 IV.

In any event, the inspection of the oil in said tanks is in conflict with the constitution of the State of Tennessee.

Up to this point we have argued the unconstitutionality of the inspection of said oil only with reference to the Federal Constitution, upon the ground that all of said oil, while in Tennessee, is the subject of interstate commerce. If, however, we should be mistaken in this regard as to the oil in either of said tanks, still it seems clear that the inspection thereof is illegal under the Constitution of Tennessee.

As already fully explained, the inspection of said oil is wholly unnecessary for the protection and benefit of the citizens of Tennessee, and, therefore, is not a valid exercise of the police power of the State. If not a reasonable or police regulation, the charge for such inspection is a mere tax or penalty. Certainly the Legislature cannot penalize certain property or a certain business within the State; and as a tax the charge cannot be sustained, because in conflict with section 28 of Article II of the Constitution of Tennessee, which requires all property to be taxed "according to its value," and that taxes be "equal and uniform throughout the State."

Since 1872 it has been settled without question in that State:

(1.) That special or local assessments are within the requirement of the Constitution that taxes be uniform and according to value.

(2.) That taxation cannot be apportioned according to the benefit each taxpayer is supposed to receive from the object on which the tax is expended.

66 Taylor, McBean *et al. v.* Chandler *et al.*, 9 Heisk. 350.

In the above case a special assessment for paving certain streets, made according to the front frontage of property on said streets, was declared absolutely void. It was sought to sustain this assessment as an exercise of police power under the authority of Aldermen *v.* Mayberry, 6 Humphrey 371, and Washington *v.* Nashville, 1 Swan 177, in which owners of property were required to lay sidewalks; but the court held that the assessment for paving was not a proper exercise

of the police power; that the doctrine of the cases relied upon would not be extended beyond the exact facts of those cases, and that if those cases were before the court as original propositions they would be decided differently.

9 Heisk. 354.

The court recalls, of course, that a dog tax cannot be sustained in Tennessee, unless according to values.

The Legislature cannot, merely by calling an act a police regulation, make it such. It must be properly referable to the police power; that is, must tend to promote domestic morals, comfort, safety, etc. In the case of Reelfoot Lake Levee District *v.* Dawson, 13 Pickle 152, this court considered the constitutionality of a special assessment for the purpose of building and maintaining a levee, holding:

(1.) That such assessment must be according to value.

(2.) That the levy of such a tax upon property in specie or by the acre is unconstitutional.

(3.) That such an assessment can not be sustained as an exercise of the police power of the State.

Upon this point the court said:

"Complainants contend, in the next place, that if the act be not sustained under the taxing power, it can be and should be sustained under the police power of the State. This latter power, like the former one, is an attribute of sovereignty; and it may right-
67 fully have expression in the form of legislation whenever needful for the promotion of public health or the preservation of public safety, order or well being. * * * Only those cases where regulation is the primary purpose can be properly referred to the police power. Obviously the burden intended to be laid on the property of the citizens by the act under consideration is not primarily for regulation. * * * Strictly speaking, it is without an element or feature of regulation. The health of the people in that locality might be somewhat improved, and even life itself might be saved occasionally, by the construction of the contemplated levee, and the consequent prevention of periodical overflows; but those are the most remote of the benefits to be anticipated from such a work, and were likely not thought of by the members of the General Assembly.

"Without further enlarging upon the subject, we hold unhesitatingly that this legislation is in no sense referable to the police power of the State, and it cannot be justified thereunder."

13 Pickle 171–173.

All the above might well have been written of the present attempt to inspect oil with which the citizens of Tennessee have no connection, dealing or concern.

This court has defined the police power and its scope as follows:

"The first right of a State, as of a man, is self-protection, and with the State that right involves the universally acknowledged power and duty to enact and enforce all such laws, not in plain conflict with

some provision of the State or Federal Constitution, as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people."

Harbison *v.* Knoxville Iron Co., 19 Pickle, 441.

68 It is difficult to understand in what regard the inspection by the State of Tennessee of the oil in the two tanks mentioned in the bill is "necessary or expedient, for the safety, health, morals, comfort or welfare of its people," or conducive to the "self-protection" and welfare of the State—unless by way of increasing its revenues.

The unconstitutionality, as we deem it, of this act under the Tennessee Constitution, if the law be construed to apply to the oil in question, inclines us to the belief that the Legislature never intended that the act be so applied.

In conclusion, we again call the attention of the Court to the fact that practical common sense and substantial justice must be against the needless and useless inspection of this oil, with which the State of Tennessee and its citizens have no concern. Opposing counsel, in the court below, referred to the action of complainant, and this suit, as a "scheme to escape the payment of inspection fees," apparently intending to convey the meaning that complainant is seeking by some trick or subterfuge to avoid the payment of charges justly imposed upon it. There is certainly nothing in the bill to warrant any such inference. It must be conceded that no practical good can come from an inspection of the Arkansas, Louisiana and Mississippi oil; and complainant states very frankly in the bill that it is advised that such oil "is not liable to inspection here if kept separate from the oil sold or intended to be sold in Tennessee." The bill further shows that complainant has paid all legal taxes, and also inspection fees upon its Tennessee oil. Under these circumstances we see no valid reason in law or morals why complainant should not in good faith present to the court the question of its liability for the payment of these inspection fees, which complainant believes to be merely unnecessary and oppressive penalties, from which
69 neither complainant, the citizens of Tennessee, nor anyone else can derive any benefit.

Respectfully submitted,

TURLEY & TURLEY,
H. J. LIVINGSTON, JR.,
For Complainant.

70 In the Supreme Court of Tennessee, April Term, 1905.

GENERAL OIL COMPANY
vs.
JOHN H. CRAIN, Inspector of Oils.

No 27, Shelby County Chancery Docket.

Brief and Assignment of Errors on Behalf of John H. Crain, Inspector of Oils for Shelby County, Tennessee.

Thos. H. Jackson, Solicitor for Complainant.
Chas. T. Cates Jr., Att'y Gen., of Counsel.

Filed Apr. 26, 1905.

JOHN W. BUFORD, *Clerk*,
By J. E. SPRINGBETT, *D. C.*

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Statement of the Case.

The bill in this case was filed by the General Oil Company against John H. Crain, Inspector of Illuminating Oils for the County of Shelby, for the purpose of enj-ining him from inspecting certain oils that were held by complainant in its warehouse, in the city of Memphis. The complainant claims that said oil had either been sold to its customers in Arkansas, Mississippi and Louisiana, or that the same was held for sale to said cutomers, and that no part of it was to be sold for consumption in Tennessee or to citizens of Tennessee.

72 That in order to separate said oil from that which it intended for sale for consumption in Tennessee, or to citizens of Tennessee, it constructed t-o large stationary tanks, marked tank 1 and tank 2. That in tank 1 it put the oil that it had already sold to its non-resident customers, or for which it had received orders before the same was shipped from its refineries in Ohio and Pennsylvania. That in tank 2 it put the oil for which it had no orders, but that said oil was held for the purpose of filling any orders that it might receive from its non-resident customers.

Tr., pp. 5, 6, 7 and 8.

That said oil comes to the city of Memphis in what is called railroad or car tanks, that hold from 5,000 to 8,000 gallons. When said oil is received it is drawn from the car tanks into said stationary tanks 1 and 2, and from thence it is drawn into barrels or smaller receptacles for the purpose of filling such orders as complainant may have on hand.

Tr., pp. 3 and 4.

Complainant is a corporation chartered under the laws of the State of Tennessee, and its principal place of business is in the city of Memphis.

Tr., p. 1.

That until quite recently, complainant had made no effort to separate the oil sold to non-resident customers from that sold to its Tennessee customers.

Tr., p. 9.

The defendant, John H. Crain, is the regular and duly appointed Inspector of Oils for Shelby County, Tennessee.

Tr., p. 2.

Complainant is and has been engaged in the manufacture and sale of coal oil and other illuminating oils for some time.

Tr., p. 2.

73 Defendant John H. Crain demurred to the bill and assigned eight grounds of demurrer.

Tr., pp. 30, 31, 32, 33, 34 and 34½.

Upon the hearing the Chancellor sustained the demurrer as to that part of the bill that sought to enjoin defendant from inspecting the oil in tank No. 2, and dissolved the preliminary injunction restraining him from inspecting and collecting fees therefor.

Tr., p. 38.

The Chancellor, however, overruled so much of the demurrer as applied to that part of the bill that sought to restrain the Inspector from inspecting the oil in tank No. 1, and made the injunction perpetual.

Tr., pp. 37 and 38.

The Chancellor overruled the eighth ground of demurrer, which went to the jurisdiction of the court.

Tr., p. 43.

Both the complainant and defendant appealed.

Tr., pp. 38, 40 and 43.

Assignment of Errors.

1.

The Court erred in overruling the eighth ground of demurrer for the reason: This is a suit against the State or against an officer of the State, acting by authority of the State, with a view of reaching the treasury funds or property of the State. Therefore, it cannot be maintained.

74 2.

The Court erred in overruling the demurrer, to those parts of the bill which seeks to enjoin the inspection of the oil contained in tank No. 1, for the following reasons: First, the oil is offered for sale in Tennesseee and is actually sold and delivered in Tennessee. Second, the statute makes it the duty of the Inspector to inspect all illuminating oils offered for sale in Tennessee.

3.

The Court erred in refusing to dissolve the injunction and in making the same perpetual, for the same reasons assigned above.

Brief and Argument.

In Order that the Court may better understand our contention, I will briefly restate some of the salient facts shown by the bill, together with the contentions of complainant, and my reply thereto.

The complainant is a corporation, incorporated under the laws of Tennessee. It is regularly engaged as a dealer in oils in said State. and in the States of Arkansas, Louisiana and Mississippi. Its principal place of business is in Memphis, Shelby County, Tennessee. Its refineries are located in the States of Ohio and Pennsylvania, and from these points it ships its product to its principal office at Memphis, and it is here distributed to the States of Arkansas, Louisiana, Mississippi and Tennessee. Up to a few days before this bill was filed complainant never attempted to separate the oil sold by
75 it for consumption in Tennessee from that sold to citizens in other States. At that time the oil was shipped by it from its refineries to Memphis in its railroad or transportation tanks and then unloaded from these tanks and placed in stationary tanks. The oil was then drawn out, as needed, and placed into barrels, or other receptacles, and delivered to its customers.

A short time before the filing of this bill, complainant conceived the idea of escaping the payment of inspection fees, on the oil sent from the stationary tanks, in Memphis, to its customers in Arkansas, Louisiana and Mississippi. In order to do this, it became necessary to separate, in some way, the oil to be consumed in Tennessee from that intended for consumption in the other States. In furtherance of this scheme, the complainant constructed and had put up, in its

yard or place of business, in Memphis, two separate, stationary tanks.

Its contention is, that into one of these tanks it puts only the oil that it has contracted to furnish to its customers in these other States, and for which it had received the orders before shipment. That this tank is marked "Oil already sold in Arkansas, Louisiana and Mississippi."

In the second tank it places the oil to fill anticipated or expected orders from these States, and that none of this oil is to be sold for consumption in Tennessee. The second tank is marked, "Oil to be sold in Arkansas, Louisiana and Mississippi."

The bill avers that this oil is shipped to Memphis, in tank cars, holding from 5,000 to 8,000 gallons. When it gets to Memphis complainant pumps it out of the car tanks into the two stationary tanks, above mentioned. It is then taken from these tanks, placed into barrels and forwarded to the States of Arkansas, Louisiana and Mississippi to its customers.

On this state of facts, complainant contends that said oil is not subject to inspection, nor to the payment of the regular inspection fees, for the following reasons:

76 1.

That the Acts of 1899, Chapter 349, does not provide for the inspection of oils, to be sold, outside of the State of Tennessee, nor to oils already sold to its customers in other States, even though the same is distributed from its warehouse, in Memphis, in broken packages. That the words of the act, "Offered for sale in Tennessee," means to sell to citizens of Tennessee for use or consumption in the State.

2.

That if, upon a proper construction of said act, the Court should be of opinion that said oil is subject to inspection and the payment of inspection fees, that said act is unconstitutional, as an interference with interstate commerce.

3.

That the fees collected are more than necessary to pay costs of inspection, are exorbitant and creats a large fund or surplus in the State treasury. Said act for that reason is not a valid police regulation and is unconstitutional.

Police Power of the State.

"The police power of the State is an attribute of sovereignty and
" it exists without any reservation in the Constitution, being founded
" upon the duty of the State to provide for the safety and good order
" of society. It corresponds to the right of self-preservation in the
" individual, and is an essential element in all orderly gov-
77 " ernments, because necessary to the proper maintenance of
" the government and the general welfare of the community.

"Upon it depends the security of social order, the life and health of "the citizen, the comfort of an existence, in a thickly populated "community, the eyjoyment of private and social life and the "beneficial use of property, and it has been said to be the very "foundation upon which our social system rests."

Am. and Eng. Ency. Law, page 918, 2d Ed.

A statute that provides for the inspection of illuminating oil in railroad tank cars is valid.

Same.

Willis *vs.* Standard Oil Co., 50 Minn., 290.

"That the State may make any business requiring police regula- "tion pay the expense of regulating and controlling it, and that this "may be done by exacting fees, license fees or inspection fees from "those engaged in the business, no one disputes."

Willis *vs.* Standard Oil Co., 50 Minn., 290.

"Laws for protecting the people against impure food, adulterated "milk and butter, decayed vegetables or unwholesome ingredients, "intoxicating liquors, inhere in the police policy of the State. The "fact that large revenue may incidentally result, is not fatal to "such law." * * *

"In the very nature of the case, the amount of the license fee "must rest in the sound discretion of the legislative branch of the "government."

Pabst Brewing Co. *vs.* Crenshaw, 120 Fed. Rep., 144-152.
123 Fed Rep., 353-359.

"It does not follow because the license fee is large, or because it "may become a part of the public revenue, that it is therefore a tax."

State *ex rel.* Troll *vs.* Hudson, 78 Mo., 302.
Cooley on Tax, 2nd Ed., p. 599.
State *vs.* Ludington, 33 Wis., 107.

78 If the act is an inspection law it cannot be interfered with on account of excessiveness of fees.

Pataps Co. *vs.* Board of Agriculture, 171.
U. S. L. Ed., p. 191.

An inspection fee of 25 cents per ton for inspecting fertilizer is held not to be so excessive as to render the act unconstitutional.

Same case.

"The fact that a large revenue results to the State for inspection "fees does not make said act a revenue measure, or a tax under the "guise of an inspection."

State *vs.* Bixman, 162 Mo., 1.
155 Mo., 671.

The bill in this case does not impeach the act upon the ground that it is a revenue measure, under the guise of a police regulation.

On the contrary, it admits that it is a police regulation, but contends that it is void because there is more revenue raised than necessary to pay inspection fees, and that 25 cents is exorbitant. This proposition is fully met by the above cases.

Interstate Commerce.

The next question is, does the inspection of oil, stored in these tanks, after it has reached its destination and received by the consignee, in Memphis, and then taken out of said tanks, placed into smaller packages and then consigned to parties in said States, interfere with interstate commerce?

We insist that it does not, for the reasons:

First.

79 The oil has reached its destination, has been received by the consignee, stored in its warehouse in Tennessee, and held for distribution in smaller quantities, hence it has become a part of the general property of the State.

Second.

The oil having reached its destination, and the original package having been broken and the contents having been taken therefrom and placed into other packages, to be distributed into smaller packages, before being reshipped to its customers, has lost its character as interstate commerce, and is subject to the inspection laws of the State.

"All intendments are in favor of the constitutionality of every "statute passed with requisite form and ceremony."

Cooley's Const. Line., 5th Ed., 218.

Railroad *vs.* Harris, 99 Tenn. 703.

"The burden is upon the person who assails a State restrictive "or prohibitory statute, so passed, as an unwarranted interference "with interstate or international commerce to show that the par- "ticular article involved is a legitimate subject of commerce. If "that fact is not made to appear in some appropriate way, his as- "sailant must be unsuccessful."

Austin *vs.* The State, 101 Tenn., 572.

"It has been truly said that the presumption is in favor of every "legislative act, and the whole burden of proof lies on him who "denies its constitutionality."

Brown *vs.* Maryland, 12 Wheaton 436.

"Every presumption is in favor of the validity of a statute, and "this continues until the contrary is shown beyond a reasonable "doubt. One branch of the government cannot encroach on the "domain of another without danger. The safety of our institu-

"tions depend in no small degree on the strict observance of this "statutory rule."

99 U. S., 718.

Austin *vs.* State, 101 Tenn. 563.

80 The oil in the stationary tanks, in Memphis, is not an original package.

"An original package within the meaning of the law of inter-"state commerce is the package delivered by the importer to the "carrier at the initial point of shipment in the exact condition in "which shipped. In the case of liquors in bottles, if the bottles "are shipped singly, each is an original package; but if a number "are fastened together and marked, or placed in a box, barrel or "crate, or other receptacle, such bundle constitutes the original "package."

Guckenheimer *vs.* Sellers, 81 Fed. Rep. 997.

"An original package is that package which is delivered by the "importer to the carrier at the initial point of shipment in the "exact condition in which it is shipped."

McGregor *vs.* Cone, 39 L. R. A. 484 (Iowa).

Austin *vs.* State, 101 Tenn. 574.

"The moment the original package is broken the commercial "clause of the Federal Constitution ceases to apply to articles of "interstate commerce."

Kimmill *vs.* State, 104 Tenn. 187.

The sale not being of an original package, but of distinct parts of an original package, and they by force of law having become parts of the general property of the State, are not within the protection of the commercial clause of the Federal Constitution.

Croy *vs.* Obion County, 104 Tenn. 525.

American Steel and Wire Co. *vs.* Speed, 2 Cates, 524.

May *vs.* New Orleans, 178 U. S. 496.

Schollenburger *vs.* Penn., 171 U. S. 1.

American Steel Co. *vs.* Speed, 192 U. S. L. Ed. 538.

Austin *vs.* Tenn. 179 U. S. L. Ed. 224.

Many other cases could be cited to the point, but we deem these sufficient for all practical purposes.

81 The oil had reached its destination. It was shipped directly to complainant. The original package had been broken. The oil had been transferred from the original package, which was the "tank car," and stored in complainant's warehouse or stationary tanks.

This oil was held for sale or distribution in Tennessee. In order to supply its customers, in said States, complainant drew oil from the stationary tanks into barrels or smaller receptacles, marked the name and address, of the customer upon the smaller package and delivered the same to a common carrier, to be forwarded to its destination. This property was at rest in Tennessee—was enjoying the

protection of the laws. It had ceased to be protected by the laws governing interstate commerce and subject to taxation and inspection under all the authorities.

Austin *vs.* Tennessee, 179 U. S. L. Ed. 224.
Brown *vs.* Houston, 114 U. S. L. Ed. 257.
May *vs.* New Orleans, 178 U. S. L. Ed. 1165.

In the case of Brown *vs.* Houston, above cited, Mr. Justice Bradley observed:

"It cannot be seriously contended, at least in the absence of "Congressional legislation to the contrary, that all goods which "are the products of other States are to be free from taxation in the "State for which they may be carried for use or sale. Take the "city of New York for example. When the assessor of taxes goes "his rounds, must he omit from his list of taxables, all goods which "come to the city from the factories of New England and New "Jersey or from the pastures and grain fields of the West? If he "must, what will be left for taxation and how is he to distinguish "between those goods which are taxable and which are not—with "the exception of goods imported from foreign countries still in "the original packages and goods in transit to some other place? "Why may he not assess all property alike that may be found in
"the city, being there for the purpose of remaining, until
82 "used or sold and constituting a part of the great mass of
"commercial capital?"

Austin *vs.* Tenn., 179 U. S. L. Ed. 230.

In the case of Corn *vs.* Scollenberger 156, p. 201, it is said:

"One who plants his foot squarely upon the public laws of the "State, and defies its officers to suppress or to punish his unlawful "trade, must show a clear legal right to take and maintain his "position as a public enemy, or suffer the penalty of a broken law."

"To hold otherwise would make it impossible for the people of a "State to protect themselves from evils that by common consent "through the civilized world need to be restrained and removed "by suitable legislation. It would strike crushing blow to absolute "crushing weight at the existence of the police power in the several "States, and render all attempts at its existence ineffectual and "useless."

The purpose of the act is to protect the people and their property from being brought in contact with oils that flash at less than 120 degrees *degrees*, this being deemed dangerous to life *to life* and property.

Third.

What is the proper construction of this act?

The wording of the act is very simple—"All oil manufactured or offered for sale in Tennessee."

The old acts of 1875 and 1877, for which this is a substitute, contained the same provisions as the act under investigation, with the exception that, under the old acts, all fees were retained by the

inspector; while under this act, the fees are paid into the treasury of the State, and the inspector is paid a salary, but in no
83 event can the salary amount to more than the fees collected by the inspector during the current year.

The Supreme Court of Tennessee, in the case of Coffin *vs.* the State, 2 Lea 559, in passing upon the old acts, construed the same provisions now under consideration. The agreed facts in that case were as follows:

"The defendants were merchants, and dealers in coal oil and "other illuminating fluids in Memphis, which they sell to merchants "and consumers in the States of Mississippi, Arkansas and other "States, as well as in the State of Tennessee. That all oil sold for "consumption in this State had been duly inspected, but the de- "fendant refused to permit oils sold for consumption in the other "States to be inspected. And they admit that they sold certain "barrels of said oils in Shelby County to a party living in Missis- "sippi, to be consumed there, without first having the same in- "spected by this act."

"It was argued in the above case that the act must be construed "to sell for consumption in this State, inasmuch as a sale for con- "sumption in another State would in no manner violate the policy "of the act, which is for consumers in this State. That it could "not have been intended to protect purchasers and consumers in "other States, because it may be perfectly lawful in those States to "sell oil that this act does not allow to be sold here." * * *

"That the object of these statutes was to protect the consumers "in the State from the dangers incident to the explosive character "of the fluids being used for burning and illuminating purposes; "it being a mere police regulation, it could have no other purpose "than the protection of th- consumers in this State." * * *

"The spirit of the act is not violated so long as the people and "consumers in this State are not subjected to the dangers arising "from the use of the condemned illuminating oils."

84 Judge McFarland, in answering this contention, said:

"This action is plausible, and such a construction as would "seem to carry out what may be fairly assumed to be the leading "objects had in view, but we have been unable to avoid the force of "the positive letter of the statute. It is made the duty of the in- "spector, by the Acts of 1877, promptly to inspect all illuminating "oils or fluids subject to inspection by this act, and it is made a mis- "demeanor for the owner to refuse him admission to his premises "for the purpose, or to obstruct him in the discharge of his duties. "This implies that it is the duty of the inspector to proceed at once, "without waiting until the owner or dealer negotiates sales." * * * "Again, the language is, it is the duty of the inspector "promptly to inspect all illuminating oils, etc., 'subject to inspection "by the act.' It is argued that this implies that there are some illu- "minating oils and fluids not subject to inspection by the act; if "this be conceded, it is not so easy to reach the conclusion that the "illuminating oils and fluids not subject to inspection are those in- "tended for sale out of the State. There is no indication of any

"such distinction in the act. But to determine what illuminating "oils and fluids are subject to inspection by the act, we must turn "to the first section, by which the Governor is to appoint an in- "spector, etc., for all illuminating oils or fluids manufactured or "offered for sale in this State. So that if the illuminating fluid is "manufactured in the State, or offered for sale in the State, the in- "spector is appointed for the purpose of inspecting it, and it is there- "fore subject to inspection in the sense of the second section of the "act."

"These general terms include all sales in the State to any person. "If it had been the purpose of the Legislature in this section to ex-
"cept sales for non-residents or for consumption out of the
85 "State, or to make this exception in the other clauses referred
"to, we would reasonably expect the exception to have been "in some manner expressed and not left altogether for inference."

I have quoted at length from the above case, as the same contentions were made there as here, and all decided against complainant's contention.

While the bill avers that the oil placed in one of the tanks has already been sold to non-resident customers, yet when it states the facts, upon which this contention is based, it is manifest that there has been no sale.

The case made by the bill, after giving the pleader the benefit of all legitimate conclusions that can be drawn from the language used, is this: Complainant is a dealer in oils at Memphis, is a citizen of Tennessee. It solicists orders in the States of Arkansas, Louisiana and Mississippi, and also sells to citizens of Tennessee. That whenever it has orders, amounting to enough to justify it in so doing, from residents of States other than Tennessee, it orders a shipment of oil from Ohio and Pennsylvania to fill these orders. It is then stored in the stationary tank; after this the orders are filled from this tank, marked and reshipped to the customers. From the time the oil leaves the refineries, until it is distributed into barrels and delivered to the common carrier at Memphis, to be forwarded to the non-resident customers, it remains the property of complainant. If any damage should happen to the oil in transit from the refineries to Memphis, or while at Memphis, in the stationary tank, the loss would be that of the complainant. The case of American Steel Company *vs.* Speed, 2 Cates, 524, is a complete answer to complainant's contention upon this point. In so far as the oil contained in the tank, held for expected orders, the same principle applies. That certainly has become a part of the general property
of the State.
86 Upon the authority of the American Steel Co. *vs.* Speed,
the oil, in both of these tanks, is the property of complainant, and for selling it can be required to pay a merchant's tax.

If this be true, it is certainly subject to the inspection laws of the State which are police powers, and not controlled by the interstate commerce clause of the Federal Constitution.

Where is the Place of Sale?

"The place of sale of goods is the place of delivery, where the sale
" is completed by delivery. Thus, if a person residing in one State,
" order*w* goods of one residing in another State, who delivers the
" goods ordered to a carrier, for the purchaser, the contract is deemed
" to be made there, in the absence of a contract to the contrary."

Am. & Eng. of Law, New Ed. Vol. 22, p. 1339.
66 Federal Rep. 686.
Milliken *vs.* Pratt, 125 Mass. 374.
First National Bank *vs.* Shaw, 1 Cates 237-240.

There can be no doubt but the oil is both sold and offer-d for sale in Tennessee.

This is a scheme, by complainant, to escape the payment of the inspection fees, such as are paid by all other dealers in oils, in Memphis.

In the language of Mr. Justice Waite, in Mitchell *vs.* Board of Commissioners, 91 U. S. L. Ed., 302, "A Court of Equity will not,
" knowingly, use its extraordinary powers to promote any scheme
" devised by a person to escape his proportionate share of the burdens
" of taxation.

87 "Although a transaction may, by a fraudulent device of
" the parties, be made to assume the form and appearance
" of interstate commerce, the Court will, nevertheless, look behind
" the mere form and outward appearance and ascertain its real char-
" acter and give it *a*ffect accordingly."

Kimmell *vs.* State, 104 Tenn., 184.

This case has many of the ear-marks to be found in Croy *vs.* Obion County, 104 Tenn., 526, and Kimmell *vs.* the State, 104 Tenn. 184.

If the contention of complainant be sound, it would put the police powers of the State in the hands of any individual who might affirm that the articles which he had on hand were not for sale to citizens of Tennessee, and the inspector could inspect only such, as each person chose to permit. This would open the door to frauds against the State, and subject it to the burden of keeping an inspector on hand all the time, to prevent the use of unsafe and dangerous articles. The Supreme Court of the United States, in the case of Hannibal *vs.* Husen, 95 U. S. 527, 2nd Ed., says:

"While we unhesitatingly admit that a State may pass sanitary
" laws, and laws for the protection of life, liberty, health or prop-
" erty within its borders; while it may prevent persons and animals
" suffering contagious or infectious diseases or convicts, etc., from
" entering the State; while for the purposes of self-protection it may
" establish quarantine and reasonable inspection laws, it may not
" interfere with transportation into or through the State, beyond
" that is necessary for its self-protection."

The case of Patterson *vs.* Kentucky, 97 U. S. 1115, L. Ed., sustains an act similar to the one under consideration.

See also United States *vs.* De Witt, 76 U. S. L. Ed. 593, 5 Wall. 470.

88 The police power of the State cannot be delegated to a citizen.

Knoxville *vs.* Knoxville Water Co., 107 Tenn. 675.
Am. & Eng. Ency. of Law, 2nd Ed., Vol. 22, p. 920.
91 Kentucky 175.

It has been held, that a law requiring the *gua*ging of any coal or coke boat, in any port of the State, with a fee to the *gua*ger, is not an unconstitutional regulation of commerce.

156 U. S. 590.

At the risk of rep*i*tition, I desire to impress upon the Court the following propositions:

First.

The complainant is a citizen of Tennessee. Its place of business is in Memphis, and it is here engaged in selling, and offering for sale, illuminating oils to citizens of Tennessee, Arkansas, Mississippi and Louisiana.

Second.

The contracts for sale are made at its place of business, at Memphis, where it receives and accepts the orders for oils.

Third.

The oil is ordered from Ohio and Pennsylvania to fill these contracts. It is consig-ed to complainant at Memphis. It comes in bulk, and on its arrival is taken out of the transportation tanks and placed into stationery tanks, built expressly to receive it.

Fourth.

During all this time it is the oil of complainant—no part of it has been separated from the general mass so as to identify it as the property of any of the parties with whom complainant has contracts.

89 Fifth.

At this point complainant begins to fulfill its contracts, by drawing the oil from its general supply in the stationary tanks into smaller vessels or receptacles, intending later to mark and deliver it to its customers.

Sixth.

The next step is the delivery. This is done by delivering the oil to the common carrier, to be — it forwarded to the purchaser outside the State.

Seventh.

Not until the delivery to the carrier is the title to the oil changed. By this delivery, the contract, between the vendor and vendee, is consummated.

Eighth.

Can it be seriously contended, upon the case made by the bill, that the contracts to sell the oil are not made in Tennessee? The orders for the oil are received and accepted here, and here the oil is delivered.

Ninth.

The complainant, from its place of business in Tennessee, offers for sale, sells and delivers oil to citizens of Mississippi, Louisiana and Arkansas.

Tenth.

The law on this point is very clear. In 2nd Parsons on Contracts, 586, it is said:

"So if one in New York orders goods from Boston, either by carrier, whom he points out, or in the usual course of trade, this would be a completion if the making of the contract, and it would be a Boston contract.

First Nat. Bank *vs.* Shaw, 1 Cates 240.
Hall *vs.* Cordell, 142 U. S. 116.
Hubble *vs.* Morristown, 95 Tenn. 585.
Armstrong *vs.* Best, 112 N. C. 59.
Milligan *vs.* Pratt, 125 Mass. 374.

90 "It is not the law of the place where the contract was signed or executed, but the law of the place where the contract was consummated, by delivery or otherwise, which governs the construction of the contract made in one State, to be performed in another."

Tiedman on Commercial Paper, 506.
1 Cates 240.

But where there is nothing to show that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance, that law must determine the rights of the parties."

95 Tenn., 586.
142 U. S., 116.
1 Cates, 204.

The contract of sale was complete upon the delivery of the oil to the common carrier, at Memphis.

Gray & Co. *vs.* Taylor Bros., 66 Fed. Rep., 686-688.
31 Cal., 629.
28 Conn., 39.
49 Conn., 155.
141 Mass., 364.

The place of sale of goods is the place of delivery, where the sale is completed by delivery.

Am. & Eng. Ency. Law, p. 1339, 2nd Ed.

"The delivery of the goods to a common carrier, consigned to the purchaser, is in legal effect a delivery to the consignee, and vests him with the right of property therein."

Och *vs.* Price, 6 Heisk., 488.

Boyd *vs.* Moseley, 2 Swan, 662.

"The rule of law applicable to delivery and to which all other rules are subordinate, is, that no sale is complete, so as to vest an immediate right of property in the buyer, so long as anything remains to be done between the buyer and the seller."

91 "The goods must all be identified, separated and distinguished from all other goods, or from the bulk and mass with which they are mixed."

Fitzpatrick *vs.* Fain, 3 Cold., 15.

Story on Contracts, Sec. 800.

Williams *vs.* Allen, 10 Hump., 337.

Magill *vs.* Holston, 6 Bax., 322.

There is a marked difference between a contract to sell and an actual sale.

"After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods."

Benjamin on Sales, 2nd Ed., 263.

Hatch *vs.* Standard Oil Co., 100 U. S., 124-136.

"Where the specific goods to which the control is to attach are not specified, the ordinary conclusion is that the parties only contemplated an executory agreement."

Same case, page 131.

Counsel for complainant admits, "that oil actually sold in Ten-" nessee, that is, the oil to be delivered to the purchasers in Ten-" nessee, whether he be a resident of that or some other State" could be inspected.

In other words, he says, "that he never intended to insist" that "offered for sale in Tennessee" meant offered for sale to citizens of Tennessee for use or consumption in the State.

I submit that this concession goes to the very life of this case, for the reason, that the contract is made here, and is fulfilled here. Here the oil is received by complainant in bulk, applied to its contracts and delivered to the purchasers through the common carrier.

The bill also attacks the act as a valid regulation, The
92 gravamen of the attack is, that more money is collected in fees than is necessary to pay the expenses of inspection. That a surplus is thereby created which the State gets the benefit of.

This contention is answered by the cases of
Pataps Co. *vs.* Board, 171 U. S., 355.
Pataps Co. *vs.* Board, 52 Fed. Rep., 690.
162 Mo., 1.
153 Mo., 671.
50 Minn., 290.

I don't see how it can be said that 25 cents is excessive for inspecting a barrel of oil and branding it as is required by the act. The amount charged for the work done is the criterion by which the reasonableness of the fee is to be judged. The fact that a surplus arises cuts no figure.

In the case of Coldwell *vs.* North Carolina, 187 U. S. 662, cited by counsel, the Court held, that the pictures and frames had been sold specifically. Each picture had been selected, together with the particular frame before the shipment was made.

It was not like a mass of oil shipped in bulk, with no means of identification, or application to the contract, until a separation could be had, in order to make delivery.

In addition to this, the vendor was a non-resident.

I especially refer the Court to the reasoning, in the 52 Fed. case. It is, in my judgment, a full answer to complainant's claim, that the fees are excessive.

The Court had no Jurisdiction of this Question.

The defendant, John H. Crain, is the duly appointed,
93 qualified and acting Inspector of Illuminating Oils for Shelby County and Memphis, Tennessee. He is an officer of the State, and is appointed by the Governor of the State, by virtue of Chapter 349 of the Acts of 1899.

He receives a salary from the Treasurer of the State (See Section 15 of Chapter 349 of the Acts of 1899), and the fees collected by him are turned into the State Treasury. (See Section 13.)

The fees, the collection of which is sought to be enjoined in this case, would be turned over by him to the State Treasurer, and therefore this action is clearly on- in which it is sought to reach the funds of the State in the hands of an officer of the State.

Section 4507 of Shannon's Code, which is as follows:

"No court in the State of Tennessee shall have any power, jurisdiction, or authority to entertain any suit against the State, or against any officer of the State, acting by the authority of the State, with a view to reach the State, its treasury, funds, or property, and all such suits shall be dis[illegible]d as to the State or such officers, on motion, plea, or demurrer of the law officer of the State, or counsel employed for the State," clearly applies in this case, and the Chancellor should have sustained the eighth ground of demurrer and dismissed the suit.

Respectfully submitted,

THOS. H. JACKSON,
Solicitor for Complainant.
CHAS. T. CATES, JR.,
Att'y Gen., of Counsel.

94 # 27, Equity Cause, Shelby County.

GENERAL OIL COMPANY
vs.
JOHN H. CRAIN, Inspector of Oils.

Additional Brief on Behalf of Appellant Crain, Inspector of Oils.

1.

The Court is without Jurisdiction of this Suit.

While it is true that the State is not named as a party defendant in this case, nevertheless it is in effect a suit against the State, and is in fact a suit against a State officer acting by authority of the State, with a view not only to *reach* the State, in its sovereign capacity, but to reach the Treasury funds and property of the State. So that it comes within the express prohibition of the statute.

In respectfully insisting upon this contention we are not unmindful of the holding of this Court in Lynn *v.* Polk, 8 Lea, 121, wherein it was held that an unconstitutional act could not be considered as "authority of the State," but we do not apprehend that this Honorable Court will hold the statute involved in this cause to be unconstitutional, and that question having been fully discussed in our printed brief it will not be reargued here.

Counsel for complainant rely upon the case of Fry *v.* Brittain, 2 Heiskell, 606, in which it was held that a suit against a Sheriff and District Attorney to enjoin them from col-ecting a void judgment in favor of the State was not a suit against the State. But counsel have altogether overlooked the causal connection between the case of Fry *v.* Brittain and the act of 1873 (Shannon's Code, sec. 4507)
95 which not only inhibits a suit against the State, but also prohibits an action against any officer of the State acting by authority of the State, with a view to reach the State. And in order to understand the scope and effect of this act, it is helpful to examine into the condition of the law existing at the time of its enactment.

The Constitution of the State (Article 1, section 17) provides that:

"Suits may be brought against the State in such manner and in such courts as the Legislature may be law direct."

This provision was inoperative until some mode of proceeding was provided by the Legislature by law constitutionally enacted.

Williams *v.* The Register, 1 Cook Rep., 218.
State *v.* Sneed, 9 Bax. 475.

In Williams *v.* The Register, *supra*, a petition for a mandamus was filed in the Circuit Court of Davidson County, to compel the Register of West Tennessee to issue a grant for a certain tract of land upon a warrant which entitled the holder to a grant, but the court held that the suit was in effect against the State, and inasmuch

as the Legislature had failed to provide for such suits by a law constitutionally enacted that the court was without jurisdiction of the case. The court said:

"The court cannot but perceive, that to grant a mandamus in this case would in effect sanction the idea that the State may be sued; and then this writ would be resorted to as the proper means of redress. On general principles, the idea of the individual citizen or subject compelling the sovereign to do an act, is repugnant to every idea of sovereignty. It is true the Constitution has said the Legislature shall have the power to provide a remedy. This, however,
96 has not been done; and until it is done, it is not within the power of the court to do that to which the Legislature are competent."

And so, although the State was not by name made a party to the petition for a mandamus, the court held that it was in effect a suit against the State.

By the Code of 1858, section 2807, (taken from the act of 1855) it was provided:

"Actions may be instituted against the State under the same rules and regulations that govern actions between private persons, process being served upon the District Attorney in which the suit is commenced."

By the act of 1865, chapter 36, section 34, it was provided:

"That section 2807 of the Code is hereby repealed."

Pamphlet Acts, p. 58.

In Fry, *et al. v.* Brittain *et al., supra,* it appears that the judgment had been taken, by summary motion, against Fry, a delinquent Tax Collector of Greene County, and part of his sureties, the proceeding against one of the living sureties having been dismissed; thereupon a bill was filed against the District Attorney and Sheriff of Greene County, *but not asking to make the State a party,* for the purpose of enjoining them from collecting said judgment, and a decree was so granted by the Chancellor.

Some time during the December term 1870 of this court, the Attorney General of the State presented the record in said case to the Supreme Court sitting at Nashville and prayed for a writ of error to bring the case up to the Supreme Court sitting at Knoxville. Upon this application it was, by this court, held:

1. The judgment was absolutely void for failure to comply with the statutory requirement authorizing summary proceeding against a delinquent officer, and *all* of his sureties, if living.

97 2. The decree enjoining the judgment *had no effect whatever against the State,* because—

(*a*) Section 2807 of the Code (erroneously referred to in the opinion as section 2806) authorizing suits against the State, was repealed by the act of 1865, consequently the court had no jurisdiction of the case as against the State;

(*b*) The bill did not purport to be filed against the State, but only against the District Attorney and the Sheriff, *which did not make the State a party,* even if the State could be sued in her own courts.

3. That the State, not being a party to the case, had no right to the writ of error and review and judgment to which she was not a party.

So that under this holding, notwithstanding there was no law authorizing a suit against the State, nevertheless a party might bring an action to enjoin an official of the State from prosecuting a suit to collect revenue or performing any other duty imposed — such official by law, and it could not be treated or considered as a suit against the State, however much the interests of the State, might be affected thereby. And such, in effect, was the result of this decision, because immediately afterward another branch of this same case was instituted in the chancery court of Greene County, but the sureties of Fry, to enjoin the District Attorney General from prosecuting another motion against Fry and his sureties—the judgment under the former motion having been declared void as above stated, and under the holding of the court in Fry *v.* Britton, the learned Attorney General of the State did not press the point raised by the demurrer to the bill to the effect that the court was without jurisdiction of the case because it was a suit against the State.

Johnson *et al. v.* Hacker, *et al.* 8 Heisk. 388, *405.*

To meet this condition, the General Assembly, at its next session after the decision in Fry *et al. v.* Britton, *et al. supra,* but after
98 the case of Johnson *et al. v.* Hacker *et al. supra,* had been instituted, by act passed February 21, 1873 (Acts 1873, ch. 13) declared:

"That no court in the State of Tennessee, has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the State; or any officer of the State, acting by authority of the State, with a view to reach the State, its treasury, funds or property, and all such suits now pending or hereafter brought shall be dismissed as to the State or such officers, on motion, plea or demurrer of the law officer of the State, or counsel employed by the State."

This act contains a preamble to the effect that some doubt existed as to whether section 2807 of the Code authorizing suits against the State had been repealed, although this point was expressly decided in Fry *v.* Britton, *supra.* It is the only case which counsel have been able to find in which the matter is referred to at all. And it is fair to assume that the distinguished lawyers who were members of the General Assembly in 1873 were fully conversant with the other point expressly adjudicated in that case, to the effect that a suit against an officer of the State, although acting under the authority of the State was not a suit against the State. It was altogether unnecessary for the Legislature to declare that no suit should be prosecuted against the State, but in order to prevent the vital interests of the State, its treasury and the State itself, from being reached by a suit against its officers, through whom alone it could act, it became necessary by express enactment to declare that the courts should not have jurisdiction to entertain any suit against an officer of the State acting by authority of the State, with a view to reach the State, its treasury and funds or property.

99 Now, if the act of 1899 be constitutional, it must be conceded that the defendant, in respect of the matters complained of in the bill, was acting by authority of the State. Then we have only to determine whether the suit was instituted with a view to reach the State, its treasury, funds or property, and if such was the effect of the suit it will necessarily follow that it is within the inhibition of the statute.

The State, or its treasury, is reached within the meaning of the statute, if it is in any way affected. And, indeed, such is one of the definitions of the verb "*reach.*" (Standard Dictionary.)

The State can only act through its proper officers, and if an injunction will lie against an official charged with the duty of collecting inspection fees which are covered into the treasury of the State, and with the more important duty of inspecting highly inflam-able substances and determining whether or not same can safely be sold to the citizens or exported without loss of credit or reputation to the State, then it needs no argument to demonstrate that such laws as are involved in this case cannot be enforced because the State is powerless to act in these matters and discharge its proper and necessary police duties except through her officers.

Construction of the Act of 1899.

The act of 1899, attacked by the bill in this case is, upon the points involved herein, substantially the same as chapter 68, of the acts of 1877, and we respectfully insist that the Supreme Court of this State in the case of Coffin *v.* State, 2 Lea, 558, in a luminous opinion by Judge McFarland, conclusively settled the question adversely to the contention of the complainant herein, but the learned counsel for complainant endeavors to distinguish that case from this, although we confess we are wholly unable to find any distinguishing marks between the two. It certainly was specific-

100 ally held in the Coffin case that it was intended by the Legislature that all oils offered for sale in Tennessee should be inspected whether the same was sold to non-residents or for consumption out of the State, and, to use the language of the court applicable to the act of 1899, as well as to the act of 1877:

"If it had been the purpose of the Legislature to except sales to non-residents or for consumption out of the State, or to make this exception in the other clauses referred to, we should reasonably expect the exception to be in some manner expressed and not left altogether to inference."

2 Lea, 566.

And it is to be noted that the attention of the court was called to those same provisions which are now insisted conclusively show that it was intended that only oils "for consumption in this State" should be inspected, and the whole matter was fully considered.

Complainant herein relies upon the phrase "*for consumption in this State*" found in section 10 of the act of 1899, as showing that

it was intended that only oils for consumption in this State should be inspected.

This same language is found in section 7 of the act of 1877, and upon full consideration was determined against the contention of the complainant herein. Moreover, when the act of 1899 is carefully analyzed it will be seen that the contention of complainant as set out on pages 16, 17, *et seq.*, of its brief, though in some respects plausible, is altogether unsound and wholly foreign to the intention of the General Assembly.

What was the intention of the General Assembly?

The act of 1899 was intended to take the place of the act
101 of 1877, and it is a familiar rule of construction that the Legislature in the passage of the act of 1899, must have intended that the same construction should be placed upon the provisions thereof as had been placed upon similar provisions in the act of 1877.

The Coffin case, *supra*, determines what construction had been placed upon the act of 1877. But without referring further to the Coffin case, let us analyze the act of 1899 in so far as the provisions thereof bear upon the questions involved in this case.

(*a.*) It is entitled, "An act to provide for the inspection of illuminating oils and fluids." *Section 1* contains a positive mandate that the Governor shall appoint for each city or county in this state containing a population of 1,000 and over, an Inspector of Coal Oil * * * or any other product of petroleum used for *illuminating* or *burning* fluid by whatever name known "*which may be manufactured or offered for sale in* in this State."

Then follows directions as to the method of inspection.

Section 2 declares that it shall be the duty of the inspector promptly to inspect or test all illuminating oils or fluids which are subject to inspection as provided in this act, within the city or county for which he is appointed. The oils or fluids which are "subject to inspection" are every product of petroleum, used for illuminating or burning fluid "which may be manufactured or offered for sale in this State."

Section 2 also makes it a misdemeanor for any dealer in or manufacturer of oils or fluids to refuse to admit an inspector upon his premises, or to in any way obstruct an inspector in the discharge of his duties under the act.

Section 3 declares the manner in which all packages inspected shall be branded, and particular attention is here called to the fact that it is the duty of the inspector to brand in a certain manner those fluids which have no flash test and which cannot be used for illuminating purposes.

102 Section 4 declares that "any person, manufacturer or dealer" who shall sell to any person whatever in the State, any of said illuminating oils and fluids before first having the same inspected, shall be guilty of a misdemeanor.

NOTE.—So that, while section 2 makes it a misdemeanor for any manufacturer or dealer to refuse to permit inspection or to place

and obstruction in the way of an inspector in the discharge of his duties, an additional misdemeanor is created by section 4, which shall operate upon an actual sale of the oil.

Section 9 (in substance the same as section 6 of the act of 1877) provides for the inspection *in transitu* of oils, *"which may be used for illuminating purposes* sent from other cities to counties in this State not having an inspector, or sent from one county to another without being properly branded by the inspector of the county from which it is sent.

NOTE.—This section applies only to oils "which *may be* for illuminating purposes" and provides for their inspection *in transitu*, where there is no inspector at the point of destination.

Section 10, a part of which is liberally quoted on pages 15 and 16 of complainant's brief, has reference solely to the oils referred to in section 9, that is, to those oils which are subject to inspection *in transitu* because they *may be* used for illuminating purposes, and it is manifest that section 10 clearly distinguishes between those oils which merely may be used for illuminating purposes and those which are clearly intended for illuminating purposes, because it is expressly provided that, "when oils specified in section 9—that is, those which are subject to inspection *in transitu* as above
103 stated—are sent from other states *"for consumption in this State for illuminating purposes"* and are found to be of less flash test than required by the act, then the inspector is directed to return, or cause to be returned, said oils to the shippers thereof. But if the oils which *may be* used for illuminating purposes (section 9) but which are not so specifically designated are found to be without a flash test, they shall be branded by the inspector, "unsafe for illuminating purposes"; and if packages or barrels containing oils or fluids are plainly marked by the manufacturers or shippers "Naptha," "Benzine," "Gasoline" together with the specific gravity thereof (these are without a flash test, and the specific gravity thereof must be branded on each package; see Section 3) then such packages or barrels may be permitted to go forward to their destination as not intended for illuminating purposes; but all barrels or packages of fluids which are not so branded or marked shall be considered as intended for illuminating purposes and returned to the shipper as above provided.

From these provisions it would seem clear that it was intended by the General Assembly that all oils manufactured or offered for sale in Tennessee should be inspected and careful provision is made for the inspection of such oils, and the branding thereof whether they be fit for illuminating purposes or not. The learned counsel for complainant is altogether mistaken in his contention that State inspection laws are solely for the benefit of the inhabitants of the State, and to insure them a safe quality of the particular commodity inspected.

As stated by Mr. Justice Story, in his great work on the Constitution:

"The object of inspection laws is to improve the quality of articles produced by the labor of a country to fit them for exportation or for domestic use."

Story on the Constitution, 5th Ed., p. 1017.

104 This is practically the language of Chief Justice Marshall in Gibbens *v.* Ogden, and the Supreme Court of the United States has determined that inspection laws may not only be applied to commodities for domestic consumption, but to exports as well; and in this connection is quoted approvingly the following language of Mr. Justice Sutherland, in Chutsman *v.* Northrop, 8 Cowan, 46:

"The object of inspection laws is to protect the community, so far as they apply to domestic sales from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the State in foreign markets.

Patapsco Guano Co. *v.* Board of Agriculture, 171 U. S., 356.

Is there any reason why Tennessee should see to it that oils set apart in tanks Nos. 1 and 2, should be inspected?

The complainant is a Tennessee corporation. Its place of business is in Tennessee. Its oils are brought here before being shipped into other localities. It is immaterial whether the oils shipped by complainant into other states are the products of this State, because it is manifest that such oils sold by a Tennessee concern and shipped from its place of business in Tennessee will be regarded as Tennessee oil, and if it be of dangerous or unfit quality, the reputation of the State will necessarily suffer, if such oils are permitted to be sold and shipped into other states. This state ought not to permit its territory to be used as a place where unfit, highly inflammable and dangerous substances, such as the oils in question, are collected and then dumped into the surrounding states. By the act in question Tennessee has endeavored to safeguard against such conditions and from complainant's action in this case it is manifest that it does not care so much for the fees charged as it resents and desires to

105 prevent the inspection of its oils. *It agrees to pay into court the amount of the inspection fees, but this must be done without an inspection, which it will not permit.*

Further, it must be borne in mind that the marking and branding of the barrels and packages, as provided in section 3 of the act, is as important as the determination of the quality of the oil contained therein, and these are among the recognized elements of inspection laws, as defined by the Supreme Court of the United States in Turner *v.* Maryland, 107 U. S., 3859; 27 Lawyers' Ed., p. 376.

Inspection Fees.

The fees provided by the act are intended solely to cover the cost of inspection.

Act of 1899, ch. 349, sec. 13, p. 816.

And it is provided that all the expenses incident to inspection, including the cost of the appliances to be furnished inspectors, all of

his expenses, record books and attorney's fees shall be paid from the funds derived from inspection and covered into the treasury of the State.

It has been determined by the Supreme Court of the United States that the question whether inspection fees are excessive will not be inquired into by the Court, and that States have a right to pass inspection laws applicable not only to foreign but to interstate commerce, and if the law is really an inspection law *the* fixed by the State must stand until Congress shall see fit to alter it.

Neilson *v.* Garza, 2 Woods, 287.
Patapsco Guano Co. *v.* Board of Agriculture, 171 U. S., 356.
State *v.* Bixman, 162 Mo., 139.

It is insisted that because these inspection fees are covered into the treasury of the State, that the act in question must be con-
106 sidered as a revenue act, but if for this reason alone the act should be determined to be unconstitutional as an unauthorized interference with interstate commerce, which we have shown elsewhere it can not be, then the only effect would be that the act of 1899 being void, the act of 1877 would still be in force, which provides that all of the inspection fees shall go to the inspectors, a condition which we apprehend would not cause any special grief either to the defendant or the other inspectors of oils of this State.

Complainant was not Entitled to an Injunction.

When the bill in this cause is analyzed we submit that there is disclosed, not a *bona fide* law-suit, but an attempt to take the opinion of this court upon the question as to how far the complainant may resist the inspection of its oils, and at the same time escape the penal consequences of its acts.

As stated in our printed brief, "fraudulent and indirect schemes to evade State laws do not meet with favor in the courts."

Mitchell *v.* Leavenworth County, 91 U. S., 206.

But notwithstanding the plain holding of this court in the Coffin case, the complainant, in order to avoid the inspection of its oils which it was accumulating upon Tennessee soil*d* for the purpose of being shipped into other states, devised a scheme of erecting two tanks from which the oil to be shipped into other States is drawn, barrelled and shipped. Then, as it avers in its bill (Tr., p. 9) having paid all inspection fees upon all of its oil shipped into Tennessee whether for sale in this state or other states "up to the present time"—that is, to the filing of the bill—it proceeds to file its bill, fill these tanks Nos. 1 and 2, and said to defendant the oil in-
107 spector, "You shall not inspect the oils contained in these tanks."

It will be borne in mind that the refusal to allow an inspector of oils to go upon the premises in the discharge of his duties, or to place any obstruction in the way, is a misdemeanor, and though guilty of a misdemeanor it invokes the intervention of a court of equity *of*

protect it. From what? *Not from any act of the inspector which under the statute would be a lien or charge upon its property or for which the inspector could bring an action at law against complainant, but merely from its own acts, which upon the face of this statute are declared to be misdemeanors.*

We submit that this bill should not have been maintained by the learned Chancellor. We submit, further, that this suit is merely an endeavor to obtain the opinion of this court upon an abstract question. Complainant has paid all of the fees which would be due for inspection into court, and if it has sold the oils contained in said tanks the same have gone out into other states without an inspection, and the reputation of the State may suffer thereby. The defendant was not permitted to inspect these oils as to their quality, and brand the packages in which they were shipped, but was merely permitted to go upon the premises to ascertain the amount upon which inspection fees could be charged in the event the contention of complainant was held to be unsound.

Decree Tr. p. 37.

Some Additional Authorities that the Act in Question is not an Unauthorized Interference with Commerce Between the States.

All inspection laws may have a remote, and in some cases a considerable influence on commerce, as recognized in the cases
108 above cited, but it is not every statute passed under the police power of the State that is void because it in some way affects commerce between the states.

We submit upon the authorities cited in our printed brief, that the matters in controversy are not subjects of interstate commerce, nor is an application of the act of 1899 to the oils contained either in Tank No. 1 or Tank No. 2 an unauthorized interference with commerce between the states. The oil in those tanks is collected and brought to rest in this State. It is subject to the laws of this State.

The Kentucky statute of 1874, providing that oils used for illuminating purposes, by whatever name called, or wherever manufactured, shall be inspected before being sold or offered for sale, was sustained by the Supreme Court of the United States, in Patterson *v.* Kentucky, 97 U. S., 501. See also Tiedman'- State and Federal Control of Persons and Property, pp. 252, 253.

State enactments that stop absolutely the flow of interstate commerce during fifty-two days (Sundays) in each year, have been held valid.

Hennington *v.* Georgia, 163 U. S., 299.
N. & W. R. R. Co. *v.* Commonwealth, 93 Va., 749; 34 L. R. A., 105.

State statutes requiring examinations and licenses of railroad employees, though engaged in conducting interstate commerce, have been sustained as reasonable police regulations for the safety of the travelling public.

Smith *v.* Ala., 124 U. S., 465.
N. C. & St. L. Ry. *v.* Ala., 128 U. S., 96.

So a State statute forbidding the heating of trains in a particular manner and applying to trains running interstate was held valid as a reasonable regulation for the safety and comfort of the public.

109 N. Y., N. H. & H. R. Co. *v.* N. Y., 165 U. S., 628.

So a State statute requiring railroads engaged in interstate and other commerce to stop three trains each way daily, Sundays excepted, has been sustained as a reasonable regulation for the public convenience.

Lake Shore, etc. R. Co. *v.* Ohio, 173 U. S., 285.

Likewise State statutes requiring separate coaches in interstate travel, as well as local, for white and colored persons, have been sustained.

Smith *v.* State, 100 Tenn., 494; 41 L. R. A., 432 and cases therein cited.

Plessy *v.* Ferguson, 163 U. S., 435.

For the reasons herein and in the printed brief set forth, we respectfully submit that the assignments of error filed by the defendant should be sustained, and the complainant'- bill dismissed.

CHARLES T. CATES, JR.,
Attorney General.

110 For Publication—Beard, J.

Filed June 30, 1906. Jno. W. Buford, Cl'k.

Jackson, April Term, 1906.

GENERAL OIL COMPANY
vs.
J. H. CRAIN.

Opinion.

The complainant is a corporation chartered under the laws of Tennessee, with its situs in Memphis, in this state, and the defendant Crain is a resident of Shelby county and the duly appointed, qualified and acting inspector of coal oil and other illuminating fluids for that county, under and by virtue of chapter 349 of the session acts of 1899 of the legislature of Tennessee.

The bill alleges that complainant is the owner of oil wells and refining plants in the states of Pennsylvania and Ohio, and for several years prior to the institution of this suit had been engaged in the manufacture, shipment and sale of coal oil and other illuminants, and in carrying on this business, it used Memphis not only as a place for the sale of its oils to the citizens thereof, but also as one of its distributing plants, to which it shipped the product of its wells and plants in railroad tank cars, from which the oil was unloaded and

then placed in various vessels for shipment to complainants' customers in Arkansas, Louisiana and Mississippi.

The bill further alleges that complainant has at its place of business in Memphis numerous tanks of oil among which are two described as follows:

(1) A tank or vessel in which complainant constantly keeps, and will keep, and in which there is now, only oil for which orders have been received from customers of complainant in Arkansas, Louisiana and Mississippi, before said oil was shipped from complain-
111 ant's plants in Pennsylvania and Ohio, and which was shipped especially to fill said orders. This oil is unloaded in Memphis from the railroad tank cars solely for the purpose of distribution into smaller vessels, or receptacles, to meet the requirements of said orders, and said oil is, and has always been, kept wholly separate and distinct from other oils and fluids of complainant in the state of Tennessee, in a tank plainly and conspicuously marked, 'Oil already sold in Arkansas, Louisiana and Mississippi,' and, of course, complainant has sold, and will sell, none of this oil in the state of Tennessee, since the same has already been sold to customers in Arkansas, Louisiana and Mississippi; in fact, this oil has remained, and will remain, in Shelby county, in the state of Tennessee, only long enought to be properly distributed, and reshipped, according to the orders therefor, whereupon it will proceed at once upon its journey to the various places in the states of Arkansas, Louisiana and Mississippi, from which said orders were received. This will be only a few days."

"(2) In another tank or vessel, at its place of business in Memphis, complainant has now and constantly keeps, and will keep, only oil shipped from Pennsylvania and Ohio for sale in the states of Arkansas, Louisiana and Mississippi, but for which complainant has no orders on hand from said states at the time of such shipments. This oil, as soon as it reaches Memphis in the railroad tank car, is placed in said tank or vessel, which is plainly and conspicuously marked, 'Oil to be sold in Arkansas, Louisiana and Mississippi,' and is there kept wholly separate and apart from all other oil, until required to supply orders received from complainants' Arkansas, Louisiana and Mississippi customers; and complainant never sells or offers for sale any oil from this tank except upon orders from Arkansas, Louisiana and Mississippi, upon receipt of which
112 complainant ships said oil to the persons sending said orders."

With regard to these tanks, which are thus designated number 1 and 2, it is alleged that at the time of the filing of the bill, as well as for a period of time previous thereto, they contained "and will hereafter contain only oil as above described, unmixed with oil held for any other purpose, and that complainant has never placed in either of said tanks any oil other than as above described, nor has complainant ever sold, or offered to sell, oil from these tanks except in the manner and to the persons above mentioned."

It is further alleged that the defendant Crain in his official capacity is engaged in the inspection of oil and other illuminating fluids, of complanant's in Memphis, receiving for such inspection a fee of

25 cents per barrel, as provided by section 8 of chapter 349 of the acts of 1899, already referred to, and that he was then claiming the right under the provision of that act to inspect the oil in tanks numbers 1 and 2, and was in the act of exercising this right, although it had been separated in the manner above alleged.

The complainant then charged "that none of the oil now in, or to — placed therein hereafter, is subject to inspection under the Tennessee law, and that the defendant Crain has no right or power to inspect any of said oil or collect fees for such inspection for the following reasons: '1, because none of said oil is covered by the language or intention of the act referred to, which is the present coal oil inspection law of Tennessee; 2, if, however, said act, when properly construed, provides for the inspection of the oil in either of said tanks'" then it is alleged that, in so far as it has that effect, it is unconstitutional and void, because a regulation of interstate commerce in violation of section 8 of article 1 of the constitution of the United States.

113 It is also further charged, that if the act of 1899 be held to apply to any of the oil in these two tanks, then it cannot be sustained as a valid exercise of the police power, first, because an inspection of these oils was unnecessary to protect either the residents of Tennessee or the reputation of the manufactured products of this state; 2, the inspection fee provided by the act was unreasonable in that it was much greater than was necessary to provide for the expense of inspection; 3, that as an inspection of these oils would in no way conduce to the health, happiness, morals or safety of the citizens of the state, the inspection fee so imposed was a mere tax under the guise of a police regulation, and as such was in conflict with article 2, section 28, of the constitution of Tennessee, which requires uniformity of taxes throughout the state.

The bill alleged, as an excuse for coming into the chancery court, asking for a decree adjudging its status as to the oil in these two tanks, and invoking its protection in the form of injunctive relief, the peril complainant would incur, under the act of 1899, in obstructing the coal oil inspector in the discharge of his duty, and in selling the oil in these tanks whether the inspection fees, if paid under protest, could be recovered by the complainant, or if this could be done, it was alleged this would only be bringing, within 30 days after each payment, a suit for recovery thereof, thus necessitating an indefinite number of suits.

The bill was demurred to, among others, upon the ground that this was a suit in fact, though not in name, against the state and therefore could not be maintained. The chancellor overruled this ground of demurrer, no doubt resting his decree on this point on the authority now relied on to support his action, of Fry *v.* Britton, 2 Heisk., 606; Lynn *v.* Polk, 8 Lea, 121.

114 The first of these was decided in 1870. From the opinion in the case it appears that a judgment had been taken in a summary proceeding against Fry, a delinquent tax collector, and a portion of his sureties; thereafter a bill was filed by the sureties against the district attorney-general and the sheriff to enjoin them

from collecting this judgment, and a decree was passed granting this relief.

During the December term, 1870, of this court, the attorney-general of the state presented the record for writ of error. His application, however, was declined, the court holding, among other things, that as the state was not a party to the suit in name, it was not entitled to assign errors.

Another branch of this case, under the style of Johnson *v.* Hacker, reached the court in 1872, though only decided in 1874, and an opinion published in 8 Heisk., 388, as a result of which, without being a party to the suit, the state's claim against a defaulting revenue collector and his sureties was finally adjudicated against it.

It is said to be a part of the legislative history of the state that this litigation produced chapter 13 of the acts of 1873, which is section 4507 of Shannon's code, and provides as follows: "That no court in the state of Tennessee has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the state, or any officer acting by the authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits now pending, or hereafter brought, shall be dismissed as to the state, or such officer on motion, plea or demurrer of the law officer of the state, or counsel employed by the state."

It is axiomatic that the state, as a sovereign, is not subject to suit save by its own consent. The constitution of 1870 provides, as did the two earlier constitutions of Tennessee, that "suits may be brought against the state in such manner and in such courts as the legislature may by law direct." This provision, however, is not self-executing. Williams *v.* The Register, Cooke 218; State *v.* Sneed, 9 Baxter, 475.

Under the constitution of 1796, and when there was no statute giving authority to bring suit against the state, a petition for mandamus was filed in the circuit court to compel the register of West Tennessee to issue a warrant entitling the holder thereto, but the court declined the writ upon the ground that, in effect, the proceeding was against the state, and in the absence of a statute providing for suits against the state, the courts were without jurisdiction. Williams *v.* The Register, *supra.*

Although the legislature, at that time, had seen proper not to put this clause of the constitution into effect, yet, its silence was regarded as being as complete an answer to the demand of the petitioner as if it had positively forbidden all interference with the state's officers or affairs. The act of 1873 in unmistakable terms has announced as the policy of the state that "no court shall hereafter have * * * jurisdiction * * * to entertain any suit against the state, or any officer of the state acting by authority of the state, with a view to reach * * * its treasury, funds or property." If without a statutory bar of this sort in Williams *v.* Register, *supra,* the court declined to interfere with the property of the state when its officer was sued, how much more shall it hesitate in face of this statute when its claim to this inspection fee is assailed in the person of the representative whose duty it is to collect the same if due? For if

the act in question is constitutional, then this is an effort to reach that which is, or is claimed by the state to be, its funds or
116 property. If Fry *v.* Britton is authority for the present contention, then we think it will be difficult to assign any reason for the act of 1873, or to name any good it has accomplished.

We are satisfied, however, that this statute is ample in its operation to do what the legislature intended in its passage, and that now the funds or property, actual or *prima facie,* of the state cannot be made the subject of litigation in its courts either by making it a party directly or indirectly by suing one of its officers, save where it has given its consent by express legislation.

In State *v.* Sneed, 9 Bext., 472, decided in 1876, an effort was made to secure a peremptory mandamus requiring a tax collector to receive from the relator notes of the Bank of Tennessee in payment of taxes for the year 1872, but it was held that the act of 1873 was a bar to the jurisdiction of the court.

It is true that in Baxter *v.* Burch, 12 Heisk., 601; Publishing Co. *v.* Burch, *Id.*, 607; Uhl *v.* Gaines, 4 Lea, 352, and other like cases decided since this act, the process of mandamus has been awarded against the Comptroller to compel him to issue warrants to parties having claims against the state allowed by law. In these cases, the statute was not adverted to and evidently for the reason that the proceedings were not regarded as within its duties. While in all of them the effort was to reach funds of the state, yet it in some legislative form had recognized the claims in question, and expressly or by implication imposed the duty upon the comptroller of issuing warrants in satisfaction of them to the respective claimants. In other words, the officer of the state had nothing but a ministerial duty to perform. As is well said by McFarland, Justice, in Lynn *v.* Polk, *supra,* the act of 1873 "would certainly not be construed
117 to deprive the court of jurisdiction to compel a ministerial officer to perform a plain ministerial duty; and when the demand of the relator is allowed by law it is the plain ministerial duty of the comptroller to issue his warrant."

This being so, we do not think this line of cases would support the present contention, even if their authority had been invoked by complainant.

But, as has already been stated, the right of the court to exercise jurisdiction in this case is also rested on Lynn *v.* Polk, *supra.* It is unnecessary to state the nature of the controversy there involved. It is sufficient to say that the bill of complainants was there maintained on the ground that the act under which the defendants—the Funding Board of the State—were proposing to act, was void for unconstitutionality.

This case, however, cannot be appealed to as authority by complainant save upon the ground that the act of 1899 is unconstitutional. The question is, is this true?

It will be observed from the allegations of the bill, hereinbefore set out, the gravamen of the complaint is that the defendant Crain is proposing to inspect and charge inspection fees as to oil "neither manufactured nor offered for sale in the state" within the purview

of the act of 1899, and it is only, should a construction otherwise be adopted, that the question of its constitutionality is raised. In other words, if complainants' main contention is sustained, that is, that the oil in tanks numbers 1 and 2 does not fall within the letter or intent of the act, the constitutionality or unconstitutionality is of no concern to the General Oil Company, and we would have presented in the record a pure academic question for consideration. It needs no citation of authority to the proposition that a court will not entertain such controversy.

118 The only question made on the face of the statute going to its constitutionality is, that the inspection fee of twenty-five cents a barrel is unreasonable and much greater than necessary to provide for the expense of such inspection.

This question is of no concern, however, to complainant unless it be, as charged in the bill, that the oil, upon which defendant was about to impose inspection fees, was in law affected with interstate commerce, For it is only in the character of one engaged in such commerce that the objection is made. To answer this question the court would be bound first to determine whether the oil in these tanks was in fact and in law, as claimed by complainant, a part of interstate commerce, and to do this we would be bound to hold, and proceed upon the theory, that the court had jurisdiction of the whole controversy. This, we are satisfied, we cannot do.

This court, therefore, does what the chancellor should have done, sustained this ground of demurrer going to the question of jurisdiction, and dismisses the bill at the cost of complainant.

It appearing, however, that a fund may have accumulated in the present case pending this litigation in the court below, and in this court, from payments made by the complainant, the cause is remanded to the chancery court in order that a disposition thereof may be made by that court.

BEARD, *J.*

119 THE STATE OF TENNESSEE:

Pleas before the Supreme Court of said State, for the Western Division thereof, at the April Term, A. D. 1906.

Present: The Hon. W. D. Beard, Chief Justice, and J. S. Wilkes, W. K. McAlister, M. M. Neil, and Jno. K. Shields, Associate Judges, when the following proceedings were had, to-wit:

JUNE 28TH, 1906.

9, Shelby Chancery Docket.

GENERAL OIL COMPANY
vs.
JNO. H. CRAIN, Inspector of Oils.

This cause came on to be heard upon a transcript of the record from the Chancery Court of Shelby County; upon consideration

whereof, the Court is of opinion that in the decree of the Chancellor there is manifest error.

It is therefore ordered, adjudged and decreed by the Court that the decree of the Chancellor be reversed; the bill in this cause be dismissed; and that the General Oil Company principal, and Thos. B. Turley, surety, pay the costs of the cause, for which let execution issue.

120 Filed Aug. 27, 1906. Jno. W. Buford, Cl'k, by J. E. Springbett, D. C.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Tennessee, sitting at Jackson, Tennessee, for the Western Division of said State, before you or some of you, at the April Term A. D. 1906, of said Supreme Court, being the highest Court of Law or Equity of said State of Tennessee in which a decision could be had in the said suit between the General Oil Company, a corporation organized and existing under the Laws of the State of Tennessee, as Complainant, and John H. Crain, inspector of coal oil, carbon oil, petroleum, kerosene oil, gasoline and other products of petroleum used for illuminating and burning fluids for Shelby County and the City of Memphis, in said State of Tennessee, as defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty statute, or commission, a manifest error hath happened, to the great damage of the said General Oil Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this

121 behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 22nd day of September, 1906, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, and the seal of the Circuit Court of the United States for the Western District of Tennessee, at Memphis, Tennessee, this the 24th day of August, A. D. 1906, and 131st. of American Independence.

[Seal of the Circuit Court of the United States, for the District of West Tennessee.]

DAN F. ELLIOTTE,
Clerk of the Circuit Court of the United States for the Western District of Tennessee.

Allowed, to operate as a supersedeas, this Aug. 24, 1906, by
W. D. BEARD,
Chief Justice of the Supreme Court of the State of Tennessee.

122 In the Supreme Court of Tennessee, at Jackson.

GENERAL OIL COMPANY
vs.
JOHN H. CRAIN, Inspector of Coal Oil, etc.

Now comes the General Oil Company, the complainant in the above entitled cause, and says, that on the 28th. day of June, 1906, this Court entered a decree herein dismissing complainant's bill at the cost of complainant, and ordering execution against complainant and its surety upon its cost bond, in which decree and in the record and proceedings in said cause manifest errors were committed to the prejudice of complainant; all of which will more in detail appear from the Assignment of Errors, which is filed with this petition.

Therefore complainant, the General Oil Company, prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, same to operate as a supersedeas; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court; and that said erroneous decree and proceedings may be reversed.

TURLEY & TURLEY,
H. J. LIVINGSTON, JR.,
Att'ys for Petitioner.

Writ of error allowed, and to operate as a supersedeas, upon petitioner entering into bond conditioned according to law in the sum of $5,000.00.

This Aug. 24, 1906.

W. D. BEARD,
Chief and Presiding Justice of the Supreme Court of Tennessee.

Filed August 17th, 1906.

JNO. W. BUFORD, *Clerk.*
By J. E. SPRINGBETT, *D. C.*

123 In the Supreme Court of Tennessee, at Jackson.

GENERAL OIL COMPANY
vs.
JOHN H. CRAIN, Inspector of Coal Oil, Etc.

Filed August 17th, 1906. Jno. W. Buford, Clerk, By J. E. Springbett, D. C.

Assignment of Errors.

Comes the complainant, the General Oil Company, and says that in the record and proceedings in the above entitled cause there is manifest error, and assigns as error, among other things, the following action of the Supreme Court of Tennessee, to-wit:

1. The said Court erred in dismissing complainant's bill at the cost of complainant, and in awarding execution against complainant and its surety on its cost bond.

2. The Court erred in sustaining the eighth ground of defendant's demurrer, and holding that the Chancery Court of Shelby County, Tennessee, and the Supreme Court of Tennessee could not entertain this suit; and in dismissing complainant's bill upon this ground.

3. The Court erred in not holding and decreeing that the oil contained and to be placed in both of the tanks mentioned in complainant's bill was a part of, and engaged in, interstate commerce while in the State of Tennessee, and therefore not subject to inspection by the defendant, or by the State of Tennessee. The Court should have held that the inspection threatened by the defendant as alleged by the bill, was an interference with and regulation of interstate commerce, to-wit: commerce between the states of Ohio and Pennsylvania, from which said oil was shipped, and the states of Arkansas, Louisiana and Mississippi, the destination of
124 said oil; and that such inspection, and defendant's charge therefor, were unconstitutional and illegal, because in violation of and in conflict with the third clause of Section 8 of Article 1 of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

4. The Court erred in refusing and failing to hold and decree that Chapter 349 of the Acts of the General Assembly of the State of Tennessee for the year 1899, mentioned in the bill, and under which Act the defendant Crain was appointed and was proposing to act, was unconstitutional, null, and void, in so far as said Act applied to or affected the oil in the two tanks mentioned in complainant's bill; because the said Act, to that extent, provides for a regulation of, or interference with, interstate commerce, in violation of the clause and section of the Constitution of the United States last above mentioned.

5. The Court erred in refusing and failing to hold and decree that the charge of twenty-five cents per barrel, proposed to be collected

by defendant for the inspection of the oil in said two tanks, was an exorbitant and unreasonable charge for such inspection, and therefore a tax under guise of police regulation, or at least an unnecessary interference with interstate commerce; and therefore illegal and void, because in violation of the clause and section of the constitution of the United States last above mentioned.

6. The Court erred in refusing and failing to hold and decree that the State of Tennessee could not, as a proper and legal exercise of its police power, inspect the oil in said two tanks and make any charge whatever for such inspection. The Court should have held that any inspection of said oil, and any charge for such inspection, could have no reference to the police power of said State, and was
125 therefore unconstitutional and illegal, because prohibited by the section and clause of the Constitution of the United States last mentioned.

7. The Court erred in not granting complainant the relief prayed for in the bill.

8. The Court erred in not enjoining the inspection of said oil by defendant Crain and the imposition of a charge therefor. The Court should have decreed such inspection and charge illegal for the reasons above stated, and should have held that, under the allegations of the bill, complainant was without adequate remedy at law for the injury threatened by defendant Crain, and granted the injunction on this account.

9. The Court erred in holding and decreeing that the Act of the General Assembly of Tennessee, being Chapter 13 of the Acts of 1873, and Section 4507 of Shannon's Code, and quoted in the opinion of the Court, was a bar to complainant's suit; and that on account of said Act said suit could not be entertained by the Chancery Court of Shelby County, Tennessee, or by the Supreme Court of Tennessee; and in dismissing complainant's bill for this reason. The Court should have held that the oil contained and to be placed in the two tanks mentioned in complainant's bill was engaged in and a part of interstate commerce; and that, in so far as said Act of 1873 prohibits, or attempts to prohibit, this suit to enjoin the inspection of such oil by the defendant and a charge therefor, the said Act of 1873 is unconstitutional, null and void, because an illegal interference with and regulation of interstate commerce in violation of the third clause of Section 8 of Article I of the Constitution of The United States above mentioned; and said Act, in so far as it prohibits or attempts to prevent complainant's suit with regard to such oil is also unconstitutional, null and void, because said Act of 1873, in connection with Chapter 349 of the Acts of 1899 above mentioned, to that extent provides for, and has the effect of,
126 depriving complainant, the General Oil Company, of its property without due process of law, contrary to and in violation of Article V of the Amendments to the Constitution of the United States, which provides that, "No person shall be deprived of life, liberty or property without due process of law."

10. The Court erred in holding that complainant's suit was against the State of Tennessee, or against an officer of the State, acting by

authority of the State; and in dismissing complainant's bill on this account. The Court should have held that said suit was not against the State of Tennessee, because said State was not named as a party to said suit; and that said suit was not against an officer of the State acting by authority of the State, because the legislature of Tennessee could not constitutionally and legally authorize an officer, or any other person, to interfere with interstate commerce; and if Chapter 349, of the Acts of 1899, mentioned in the bill, be construed to provide for the inspection of the oil mentioned in the bill, then the said Act of 1899 is, to this extent, unconstitutional, because an interference with and regulation of interstate commerce, and is therefore not a law of the State of Tennessee; and if said Act of 1899 be construed not to provide for the inspection of the oil mentioned in complainant's bill, then the defendant Crain, in attempting to inspect said oil, was acting beyond and outside of the authority conferred upon him by said Act, and was attempting to interfere with said oil, which was interstate commerce, without the authority of the State of Tennessee, and as a naked trespasser.

11. The Court erred in holding that complainant's bill was a suit brought with a view to reach the State of Tennessee, its treasury, funds or property. The Court should have held that the fees sought to be collected by the defendant Crain upon the oil mentioned
127 in said bill were not legally the funds or property of the State of Tennessee, because said State can not legally collect such charges upon interstate commerce.

Therefore the complainant prays that the decree of the Supreme Court of the State of Tennessee be reversed.

TURLEY & TURLEY,
H. J. LIVINGSTON, JR.,
Att'ys for Complainant.

128 GENERAL OIL COMPANY
vs.
JOHN H. CRAIN, Inspector of Coal Oil, Etc.

Filed Aug. 27, 1906. Jno. W. Buford, Clerk, by J. E. Springbett, D. C.

Know all men by these presents, that we, the General Oil Company, a corporation organized and existing under the Laws of the State of Tennessee, as principal, and Thos. B. Turley and H. J. Livingston, Jr., as sureties, are held and firmly bound unto John H. Crain, inspector of coal oil, carbon oil, petroleum, kerosene oil, gasoline, and other products of petroleum used for illuminating and burning fluids, for Shelby County and the City of Memphis, in the State of Tennessee, in the sum of Five Thousand ($5,000.00) Dollars, to be paid to the said obligee, his successors, representatives and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

But the condition of the above obligation is such, that whereas the

above named and bounden General Oil Company, as plaintiff in error, has obtained or is about to obtain a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Tennessee, sitting at Jackson, Tennessee, for the western division of Tennesee, to reverse a judgment and decree rendered in the above entitled cause by the said Supreme Court of the State of Tennessee at its April Term, 1906, against the said General Oil Company and in favor of the said John H. Crain, inspector etc., dismissing the bill of said General Oil Company and adjudging costs against it and its surety on its cost bond.

Now, therefore, if the above named General Oil Company, plaintiff in error, shall prosecute its said writ of error with effect, or failing to make good its plea in that regard, shall answer all
129 damages and costs, and moreover shall abide by and perform the judgments and decrees of the Supreme Court of the United States in the premises, then this obligation shall be void, otherwise to remain in full force and effect.

In testimony whereof, we have hereunto set our hands, this the 18th day of August, 1906.

GENERAL OIL COMPANY,
By TURLEY & TURLEY, *Att'ys.*
THOS. B. TURLEY, *Surety.*
H. J. LIVINGSTON, Jr., *Surety.*

MEMPHIS, TENNESSEE, *August, 18th,* 1906.

As Clerk of the Circuit Court of the United States for the western district of Tennessee, I hereby certify that the sureties on the foregoing bond are amply good for the amount of the penalty thereof.

[SEAL.] DAN F. ELLIOTTE,
Clerk of the Circuit Court of the United States for the Western District of Tennessee.

The foregoing bond, and the sureties thereon, are hereby accepted and approved by me as Chief Justice of the Supreme Court of the State of Tennessee.

W. D. BEARD,
Chief Justice Supreme Court of the State of Tennessee.

Filed, Aug. 27, 1906.

JNO. W. BUFORD, *Clerk,*
By J. E. SPRINGBETT, *D. C.*

130 In the Supreme Court of Tennessee, at Jackson.

GENERAL OIL COMPANY
vs.
JOHN H. CRAIN, Inspector of Coal Oil, Etc.

The above entitled matter coming on to be heard upon the petition of the complainant, the General Oil Company, for a writ of error

and supersedeas from the Supreme Court of the United States to the Supreme Court of Tennessee, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented in the record in said matter;

It is ordered that a writ of error be, and is hereby, allowed to this Court from the Supreme Court of the United States, the same to operate as a supersedeas, and that the bond presented by said petitioner be, and the same is hereby approved.

W. D. BEARD,
Chief Justice of the Supreme Court of the State of Tennessee.

Filed, Aug. 27, 1906.

JNO. W. BUFORD, *Clerk.*
By J. E. SPRINGBETT, *D. C.*

131 UNITED STATES OF AMERICA, *ss:*

To John H. Crain, inspector of coal oil, carbon oil, petroleum, kerosene oil, gasoline, and other products of petroleum used for illuminating and burning fluids for the county of Shelby and city of Memphis, in the State of Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Tennessee, wherein the General Oil Company, a corporation under the laws of the State of Tennessee, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. D. Beard, Chief Justice of the Supreme Court of the State of Tennessee, this the 24th day of August, in the year of our Lord One Thousand nine hundred and six.

W. D. BEARD.
Chief Justice of the Supreme Court of the State of Tennessee.

Copy of the within citation received and service accepted for John H. Crain, Inspector etc., defendant in error, this the 27th day of August, 1906.

THOS. H. JACKSON,
Att'y for John H. Crain, Inspector, etc.

Filed Aug. 28, 1906.

JNO. W. BUFORD, *Clerk.*
By J. E. SPRINGBETT, *D. C.*

132 THE STATE OF TENNESSEE:

I, Jno. W. Buford, Clerk of the Supreme Court of said State for the Western Division thereof, at Jackson, do hereby certify that the foregoing 132 pages is a true, perfect and complete copy of the Record, assignment of errors, briefs of Counsel, Opinion, decree, Petition for writ of error and supersedeas from the Supreme Court of United States, assignment of errors, Bond for writ of error and supersedeas, order allowing writ of error and supersedeas, before said Court at its April term 1906, in the case of General Oil Company *vs.* John H. Crain, Inspector of oils, as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in the City of Jackson, on this, the 17th, day of September A. D. 1906, and of the Independence of the United States the 130 year.

[Seal Supreme Court of Tennessee, Western Division, Jackson.]

JNO. W. BUFORD, *Clerk,*
By J. E. SPRINGBETT, *D. C.*

Endorsed on cover: File No. 20,409. Tennessee Supreme Court. Term No. 444. General Oil Company, plaintiff in error, *vs.* John H. Crain, inspector of coal oil, carbon oil, petroleum, ke[illegible]ne oil, gasoline, &c., for the county of Shelby and city of Memph[illegible] Tenn. Filed October 8th, 1906. File No. 20,409.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1907.

No. 128

GENERAL OIL COMPANY, *Plaintiff in Error,*

vs.

JOHN H. CRAIN, Inspector of Coal Oil, Carbon Oil, Petroleum, Kerosene Oil, Gasoline, Etc., for the County of Shelby and City of Memphis, in the State of Tennessee,
Defendant in Error.

In Error to the Supreme Court of the State of Tennessee.

Brief for Plaintiff in Error.

THOMAS B. TURLEY,
Attorney.

S. C. TOOF & CO., LITHOG. & PRS., MEMPHIS.

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In Error to the Supreme Court of the State of Tennessee.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This suit raises the question of the right of the Tennessee coal oil inspector at Memphis, Tenn., to inspect certain oils belonging to the plaintiff in error, the General Oil Company.

The Bill.

Said company, as complainant in a bill filed November 19, 1904, in the Chancery Court of Shelby County, Tennessee, alleges that it is a Tennessee corporation, with its situs and principal place of business at Memphis, Tenn.; that the defendant, the said Crain, is a resident

of Shelby County, and is the duly appointed, qualified and acting inspector of coal oil and other illuminating and burning fluids for said county and the City of Memphis, under and by virtue of Chapter 349 of the Acts of 1899 of the Legislature of the State of Tennessee. (A copy of said act is appended to this brief.)

The bill alleges that the complainant is engaged in the manufacture, shipment and sale of coal oil and other illuminants, in various states of the United States. That its wells and refining and manufacturing plants are all located in the states of Pennsylvania and Ohio, and from these plants it ships its manufactured and merchantable products to various states, in which they are sold and used. That on account of the nature of such illuminating oils and fluids, their tendency to leak and evaporate, and their liability in case of change of temperature to burst the vessels in which they are contained, the usual and in fact the only practicable manner in which such oils and fluids can be shipped for long distances is by means of "tank cars," consisting of large metal tanks permanently fixed upon railroad cars. That each of these tank cars contains from five to eight thousand gallons of oil, while complainant's orders and sales vary in amount from one barrel upward, and are scattered over large territory. Furthermore, an extensive plant and apparatus is necessary in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impossible to have such apparatus and machinery at every point to which complainant ships oil. For these reasons, and because of the great delay and expense in the way of freight charges incident to such a plan, it is impossible in the coal oil business such as complainant carries on to fill

separately each order directly from these railroad tank cars but it is absolutely necessary to have distributing points at various places throughout the United States, where complainant may unload and receive its oil from these tank cars and then place the same in barrels, or other vessels, of a size suitable for filling its orders.

The bill further alleges that for some years past complainant has been engaged in business at Memphis, and has used that city not only as a place of business, where it sells oil to the citizens and residents of Memphis and the State of Tennessee, but also as one of its distributing points, to which it has oil shipped from its wells and plants in Pennsylvania and Ohio, in railroad tank cars, from which said oil is unloaded at Memphis and placed into various tanks, barrels and other receptacles, for the purpose of being forwarded to complainant's customers at various places in the States of Arkansas, Louisiana and Mississippi. And complainant alleges that in the course of its business it has many regular customers in said states, from whom it always has on hand unfilled orders for oil to be delivered as soon as possible or convenient.

The bill further alleges that the complainant has at its place of business in Memphis numerous tanks or receptacles for oil, of various kinds and sizes, among which are two described in the bill as follows:

> "(1) A tank or vessel in which complainant constantly keeps, and will keep, and in which there now is, only oil for which orders have been received from customers of complainant in Arkansas, Louisiana and Mississippi, before said oil was shipped from complainant's plants in Pennsylvania and Ohio, and which was shipped especially to fill said orders. This oil is unloaded in Memphis from the railroad

tank cars solely for the purpose of distribution into smaller vessels, or receptacles, to meet the requirements of said orders, and said oil is, and has always been, kept wholly separate and distinct from all other oils and fluids of complainant in the State of Tennessee, in a tank plainly and conspicuously marked *'Oil already sold in Arkansas, Louisiana and Mississippi'*; and of course complainant has sold, and will sell, none of this oil in the State of Tennessee, since the same has already been sold to customers in Arkansas, Louisiana and Mississippi; in fact, this oil has remained, and will remain, in Shelby County, and the State of Tennessee, only long enough to be properly distributed and reshipped, according to the orders therefor, whereupon it will proceed at once upon its journey to the various places in the States of Arkansas, Louisiana and Mississippi, from which said orders were received. This will be only a few days.

(2) In another tank or vessel, at its place of business in Memphis, complainant has now, and constantly keeps, and will keep, only oil shipped from Pennsylvania and Ohio for sale in the States of Arkansas, Louisiana and Mississippi, but for which complainant has no orders on hand from said states at the time of such shipments. This oil, as soon as it reaches Memphis in the railroad tank car, is placed in said tank or vessel, which is plainly and conspicuously marked *'Oil to be sold in Arkansas, Louisiana and Mississippi,'* and is there kept wholly separate and apart from all other oil, until required to supply orders received from complainant's Arkansas, Louisiana and Mississippi customers; and complainant never sells, or offers for sale, any oil from this tank, except upon orders from Arkansas, Louisiana and Mississippi, upon the receipt of which complainant ships said oil to the persons sending said orders."

With regard to these tanks (which will hereinafter be referred to as Tank No. 1 and Tank No. 2, respectively), the bill further alleges that:

"Each of said two tanks at the present time contains, and will hereafter contain, only oil as above

described, unmixed with oil held for any other purpose, and complainant has never placed in either of said tanks any oil other than as above described, nor has complainant ever sold or offered to sell oil from these tanks, except in the manner and to the persons above mentioned."

Transcript, pp. 1-4.

The bill alleges that the defendant John H. Crain, in his official capacity, from time to time inspects the oils and illuminating fluids of complainant in Memphis, charging and collecting for such inspection the regular fee of twenty-five cents per barrel, as provided by section 8 of the act of 1899, above mentioned, and that complainant has heretofore fully paid such charges upon all of its oil shipped into Tennessee, whether intended for sale in this state or elsewhere. That until quite recently complainant has unloaded the greater portion of its oil from the railroad tank cars into its stationary tanks at Memphis, without attempting to separate the oil sold, or to be sold, in Arkansas, Louisiana and Mississippi, from that sold, or intended for sale, in Tennessee. But that it is now separating its oils in the manner above described because it is advised that the oil already sold, or intended for sale, outside of Tennessee is not liable to inspection, if kept separate from the oil sold, or intended for sale, in said state.

The bill then charges that none of the oil now contained, or to be hereafter placed, in either of said tanks, is subject to inspection by the defendant Crain, and to payment of fees for such inspection, for a number of reasons. Certain of these raise no Federal question, and need not be noticed here. Those now relied upon will be hereinafter fully presented, but it is necessary at this point to call attention to certain allegations of fact in

said bill in connection with the question of interstate commerce raised therein.

Said bill charges that all of the oil contained in said tanks, during the time it is in the State of Tennessee, is properly the subject of interstate commerce, to-wit: Commerce between the States of Pennsylvania and Ohio, from which said oil is shipped, and the States of Arkansas, Louisiana and Mississippi, into which it is finally carried; that an inspection thereof by the defendant Crain, and the imposition of a charge for such inspection, would be a regulation of and an interference with commerce between said states, in violation of the third clause of section 8 of article I. of the Constitution of the United States; and that the Tennessee inspection law, being chapter 349 of the acts of 1899, if construed to require inspection of any of said oil, is to that extent unconstitutional under the above article and section.

Trans. p. 6.

The bill further charges in this regard that the inspection of any of the oil in either of said tanks cannot be sustained as a valid exercise of the police power of the State of Tennessee:

(a) Because none of said oil is sold in Tennessee, and none of it is manufactured in Tennessee; hence, the inspection thereof is wholly unnecessary to protect either the residents and citizens of Tennessee, or the reputation of her manufactured products abroad.

(b) Because the fees provided by said act of 1899 are unreasonable and excessive, and very much greater than necessary to provide for the expenses of inspection. So that there is annually paid into the treasury of the state, after the payment of all salaries and ex-

penses incident to such inspection, a surplus of many thousands of dollars, which is diverted to other uses.

Trans. pp. 6-7.

The bill further alleges that the States of Arkansas and Louisiana both have laws for the inspection of illuminating fluids of this character, enacted for the protection of their own citizens, and covering all such fluids sold or offered for sale in said states; and that these laws make no exception from their requirements in favor of oil previously inspected in other states, nor do the Arkansas and Louisiana inspectors in any way recognize the inspection of the Tennessee authorities; hence, so far as the protection of the citizens of Arkansas and Louisiana is concerned, the Tennessee inspection of oil to be used by them is not only unnecessary, but in fact imposes upon complainant, and upon its oil sold in said states, the double expense of two inspections of the same oil. The bill alleges that the State of Mississippi has no law providing for inspection of such oils, and charges that the police power of the State of Tennessee does not extend to the attempted protection of citizens of a state which has not deemed it necessary to their protection to inspect the oil used by them.

Trans. p. 5.

The bill further charges that in spite of the facts above set forth, and in spite of the fact that the defendant Crain knows and admits that complainant never makes sales from either of said tanks except to persons in Arkansas, Louisiana and Mississippi in the manner above mentioned, and in spite of the fact that complainant has paid all taxes and inspection fees upon the rest of its oils in the State of Tennessee, the said defendant is claiming

the right to inspect the oil in Tanks Nos. 1 and 2, and to collect the regular fees therefor, and is in the act of exercising this right. The bill alleges, as reason for coming into the chancery court, asking for a decree adjudging its status as to the oil in these tanks, and invoking its protection in the form of injunctive relief, the heavy criminal penalties provided by the act of 1899 against a dealer or manufacturer obstructing the coal oil inspector in the discharge of his duty, or selling oil without inspection. Furthermore, that since said act purports to impose said fees merely to cover the expense of inspection, and not as a tax, it is doubtful whether the same, even if paid under protest, could afterwards be recovered by complainant from the state under the statute permitting suits to recover *taxes* paid under protest; and if such payments could be recovered at all, under the terms said statute suit would have to be brought every thirty days for fees paid within the preceding thirty days, thus necessitating an indefinite number of suits.

For these reasons, the bill alleges that complainant is without adequate remedy at law against the illegal and unauthorized action threatened by defendant, and without injunctive relief will suffer irreparable injury.

Trans. pp. 7-8.

The bill prays for preliminary and perpetual injunctions restraining the defendant from inspecting any of the oil contained or to be placed in said tanks, and from attempting to collect any inspection fees upon said oil, or interfering in any way with the sale and shipment thereof.

Trans. pp. 8-9.

The chancellor granted a preliminary injunction in accordance with the prayer of the bill, requiring the

complainant, in lieu of injunction bond, to pay into court the amount of the regular inspection fees upon the oil contained or thereafter to be placed in said tanks pending the suit, said fund to await the decision of the cause; and giving the defendant the right to examine said tanks at will, for the purpose of determining the quantity of such oil.

Trans. p. 12.

Demurrer.

Thereupon the defendant demurred. The grounds of demurrer need not be stated at length. They clearly raise the question of the legal sufficiency of the bill, and contend:

1. That the bill shows upon its face that all of the oil contained, and to be placed, in said two tanks is subject to inspection under the Tennessee laws; and that none of the matters stated in said bill exempt any of said oil from such inspection.

2. That none of said oil is interstate commerce while in Tennessee in said tanks, because the original package, to-wit, "car-tank," is broken at Memphis, and the oil contained therein is thus commingled with the other property of Tennessee, and loses its character as interstate commerce.

3. That the alleged excessiveness and unreasonableness of the inspection fees does not render the act unconstitutional.

4. That the allegations of the bill show both a sale, and an offering for sale, of said oil in Tennessee.

5. That the court has no jurisdiction of the cause, because the same is "a suit against the state or against

an officer of the state, acting by authority of the state, with a view to reach the state, its treasury, funds or property." (This being eighth ground of demurrer, as drawn by defendant.)

Trans. pp. 10-11.

The defendant also moved to dissolve the preliminary injunction previously granted.

Trans. p. 11.

The chancellor overruled the last ground of demurrer (denying the jurisdiction of the court) as to the oil contained, and to be placed, in both of said tanks. And further overruled all other grounds of demurrer as to those parts of the bill in reference to the oil contained, and to be placed in Tank No. 1, above mentioned, marked "*Oil already sold in Arkansas, Louisiana and Mississippi,*" holding that such oil is not legally subject to inspection, and disallowed the motion to dissolve the preliminary injunction as to such oil.

From all the above defendant prayed and perfected an appeal to the Supreme Court of Tennessee.

As to the oil contained, and to be placed, in Tank No. 2, marked "*Oil to be sold in Arkansas, Louisiana and Mississippi,*" the chancellor sustained those grounds of the demurrer claiming that this oil was subject to inspection under the Tennessee law; dismissed all parts of the bill in reference to such oil, and dissolved the preliminary injunction in that regard.

From this action of the court the complainant appealed.

Trans. pp. 12-13.

In the Supreme Court of Tennessee complainant and defendant, respectively, assigned as error the portions

of the chancellor's decree unfavorable to them, and from which they had appealed. Thus the whole matter was presented for determination *de novo* upon the bill and demurrer.

Trans. pp. 22, 44.

On June 28, 1906, the Supreme Court of Tennessee entered a decree reciting that the decision of the chancellor was erroneous, and ordering that the same be reversed and that complainant's bill be dismissed.

Trans. pp. 71-72.

From the opinion of the court, filed on June 30, 1906, it appears that the decree of the Supreme Court was based entirely upon ground that the Chancery Court of Shelby County and the Supreme Court of Tennessee had no jurisdiction of the suit and could not hear the same upon the merits, because of a certain statute of Tennessee, being chapter 13 of the acts of 1873, and section 4507 of Shannon's Code, which provides as follows:

> "That no court in the State of Tennessee has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the state, or any officer acting by the authority of the state, with a view to reach the state, its treasury, funds or property, and all such suits now pending, or hereafter brought, shall be dismissed as to the state, or such officer, on motion, plea or demurrer of the law officer of the state, or counsel employed by the state."

This statute was the basis of the eighth ground of defendnt's demurrer. The Supreme Court held that complainant's bill was in fact, though not in name, against the State of Tennessee, and therefore could not be maintained in the face of this statute.

Trans. pp. 66-71.

Subsequently the cause was removed to this court by writ of error, allowed and ordered to act as a supersedeas by Mr. Chief Justice Beard, of the Supreme Court of Tennessee, on August 24, 1906; the plaintiff in error entering into bond in the sum of $5000.

Trans. p. 73.

Upon this writ of error, the plaintiff in error filed an assignment of errors in the Supreme Court of Tennessee.

Trans. pp. 74-76.

The errors pointed out in said assignment, together with other errors committed by said Supreme Court of Tennessee, upon which the plaintiff in error now relies as grounds for reversal by this court, are embraced in the following

SPECIFICATION OF ERRORS.

I.

The Supreme Court of Tennessee erred in dismissing the bill of plaintiff in error, in taxing costs against plaintiff in error, and in awarding execution for same against plaintiff in error and its surety on its cost bond.

II.

Said court erred in sustaining the eighth ground of demurrer filed by defendant in error, and holding that the Chancery Court of Shelby County, Tennessee, and the Supreme Court of Tennessee, could not entertain this suit; and in dismissing the bill of plaintiff in error upon this ground.

III.

Said court erred in not overruling all grounds of said demurrer.

IV.

Said court erred in not holding and decreeing upon said demurrer that the oil contained, and to be placed, in both of the tanks mentioned in the bill was a part of and engaged in interstate commerce while in the State of Tennessee, and therefore not subject to inspection by the defendant in error, or by the State of Tennessee. Said court should have held that the inspection threatened by the defendant in error, as alleged in said bill, was an interference with and regulation of interstate commerce, to-wit, commerce between the States of Ohio and Pennsylvania, from which said oil was shipped, and the States of Arkansas, Louisiana and Mississippi, the destination of said oil; and that such inspection and the

charge therefor were unconstitutional and illegal, because in violation and in conflict with the third clause of section 8 of article I of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

V.

Said court erred in refusing and failing to hold and decree upon said demurrer that chapter 349 of the Acts of the General Assembly of the State of Tennessee for the year 1899, mentioned in the bill, under which act the defendant in error Crain was appointed and was undertaking to act, was unconstitutional, null and void, insofar as said act required the inspection of, applied to, or affected the oil in the two tanks mentioned in said bill, because said act to that extent provides for a regulation of and an interference with interstate commerce, in violation of the clause and section of the Constitution of the United States last above mentioned.

VI.

Said court erred in refusing and failing to hold and decree upon said demurrer that the charge of twenty-five cents per barrel, proposed to be collected by the defendant in error for the inspection of the oil in said tanks, and thereafter to be contained therein, was an exorbitant and unreasonable charge for such inspection, and therefore a tax under guise of police regulation, or at least an unnecessary interference with interstate commerce, and therefore illegal and void, because in violation of the clause and section of the Constitution of the United States last above mentioned.

VII.

Said court erred in refusing and failing to hold and decree that the State of Tennessee could not, as a proper and legal exercise of its police power, inspect the oil in said two tanks and make any charge whatever for such inspection. The said court should have held that any inspection of said oil by defendant in error, and any charge for such inspection, could have no reference to the police power of said state, and was therefore unconstitutional and illegal, because prohibited by the section and clause of the Constitution of the United States last above mentioned.

VIII.

Said court erred in refusing and failing to hold upon said demurrer that the inspection threatened by the defendant in error, as alleged in said bill, and the charge to be made for such inspection, was depriving plaintiff in error of its property without due process of law, and denying to plaintiff in error the equal protection of the laws, in violation of section 1 of article XIV. of the Amendments to the Constitution of the United States, which provides that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

IX.

Said court erred in not granting plaintiff in error the relief prayed for in said bill.

X.

Said court erred in not enjoining the inspection of said oil by defendant in error, Crain, and the imposition of

a charge therefor. Said court should have decreed such inspection and charge illegal for the reasons above stated, and should also have held that under the allegations of the bill the plaintiff in error was without adequate remedy at law for the injury threatened, and on this account should have continued the temporary injunction and upon final hearing should have made the same perpetual.

XI.

Said court erred in holding and decreeing that the act of the General Assembly of Tennessee, being chapter 13 of the Acts of 1873, and section 4507 of Shannon's Code (quoted in the opinion of the court), was a bar to this suit, and that on account of said act the bill of plaintiff in error could not be entertained by the Chancery Court of Shelby County, Tennessee, or by the Supreme Court of Tennessee; and in dismissing said bill for this reason. Said court should have held that the oil contained, and to be placed, in the two tanks mentioned in said bill was engaged in and a part of interstate commerce while in Tennessee, and that, insofar as said act of 1873 prohibits or attempts to prohibit this suit to enjoin the inspection of such oil by defendant in error and the imposition of a charge therefor, the said act of 1873 is unconstitutional, null and void, because an illegal interference with and regulation of interstate commerce, in violation of the third clause of section 8 of article I. of the Constitution of the United States, above mentioned. And said act of 1873, insofar as it prohibits or attempts to prohibit a suit of this character with regard to such oil, is also unconstitutional, null and void, because said act of 1873, together with chapter 349 of the Acts of 1899, has the effect of the State of Tennessee depriving

plaintiff in error, the General Oil Company, of its property without due process of law, and denying to plaintiff in error, a person within its jurisdiction, the equal protection of the laws, contrary to and in violation of section 1 of article XIV. of the Amendments to the Constitution of the United States, above mentioned.

XII.

Said court erred in holding that the suit of plaintiff in error was against the State of Tennessee, or against an officer of the state, acting by authority of the state; and in dismissing said bill on this account. Said court should have held that said suit was not against the State of Tennessee, because said state was not named as a party on the record, and because said suit is not in effect against said state; and that said suit was not against an officer of the state acting by authority of the state, because the Legislature of Tennessee could not constitutionally and legally authorize an officer, or any other person, to interfere with interstate commerce or deprive any person of property without due process of law; and if chapter 349 of the Acts of 1899, mentioned in said bill, be construed to provide for the inspection of oil mentioned in said bill, then said act of 1899 was to this extent unconstitutional under the Federal Constitution, because it provided for an interference with and regulation of interstate commerce, and also because it provided for depriving plaintiff in error of its property without due process of law, and was, therefore, in fact not a valid law of the State of Tennessee; and if the act of 1899 be construed not to provide for the inspection of the oil mentioned in said bill, then the defendant in error Crain, in attempting to inspect said oil and make charge there-

for, was acting beyond and outside of the authority conferred upon him by said act, and was attempting to interfere with interstate commerce, and deprive plaintiff in error of its property without due process of law, without color of authority from the State of Tennessee, and as a naked trespasser.

XIII.

Said court erred in holding that the bill of plaintiff in error was a suit brought with a view to reach the State of Tennessee, its treasury, funds, or property. Said court should have held that the fees sought to be collected by the defendant in error upon the oil mentioned in said bill were not legally the funds or property of the State of Tennessee, because said state, under the provisions of the Constitution of the United States above mentioned, cannot legally collect such charges upon interstate commerce, or collect charges which amount to depriving a person of property without due process of law.

XIV.

For all of the above reasons, said court erred in sustaining the demurrer of defendant in error and dismissing the bill.

BRIEF AND ARGUMENT.

The errors above specified will not be taken up *seriatim*, but the several questions presented will be discussed in what is conceived to be their logical order.

I.

Jurisdiction of the Court.

Inasmuch as the Supreme Court of Tennessee expressly declined to pass upon the merits of the bill, and dismissed the same because of the state statute quoted above, it is perhaps necessary at this point, before discussing the merits of the suit, to show the Federal question involved upon this writ of error.

The contention of plaintiff in error in this regard, briefly stated, is as follows:

1. The bill undoubtedly presents for determination certain Federal questions; that is, in said bill the plaintiff in error asserts certain rights under the Constitution of the United States.

2. Said bill further shows special conditions which prevent plaintiff in error from obtaining adequate protection in said constitutional rights except by injunction.

3. This being true, the mere refusal of the Chancery Court of Tennessee to take jurisdiction and grant this injunctive relief is a practical denial of the above constitutional rights, which may be reviewed by this court.

4. More especially is this true where the refusal of said state court to grant such relief is in obedience to

or under color of an express state statute. For said statute, insofar as it operates to deny to plaintiff in error constitutional rights, is in itself in conflict with the Constitution of the United States, and subject to be so declared by this court. Thus, a statute of Tennessee which closes the doors of the courts and prevents plaintiff in error from obtaining adequate protection against an illegal inspection of oil which is not subject to inspection under the Federal constitution, itself amounts to an interference with interstate commerce, and deprives plaintiff in error of its property without due process of law, and denies to plaintiff in error the equal protection of the laws, in contravention of the Constitution of the United States.

IS THIS A SUIT AGAINST THE STATE OF TENNESSEE?

The Supreme Court of Tennessee held it to be such in effect, and dismissed the bill upon that ground. While this was done upon the express authority of the act of 1873 above mentioned, said court, in its opinion, recognized the fact that this statute added nothing to the axiomatic principle that the state, as a sovereign, is not subject to suit save by its own consent.

Trans. p. 69.

The states are expressly protected in this immunity from suit by the Eleventh Amendment to the Constitution of the United States, and perhaps no provision of that instrument has been more frequently passed upon.

In the leading case of Osborn v. Bank of the United States, 9 Wheaton 739, an injunction bill was filed by the bank, in the United States Circuit Court of Ohio, against Osborn, Auditor of the State, for the purpose of enjoining proceedings against said bank under the Revenue

Act of Ohio, which was alleged to be in conflict with the Federal law. It was admitted that the proceeding was in effect a suit against the State of Ohio, since the state was exclusively interested in the result; but this court, through Mr. Chief Justice Marshall, held that, inasmuch as said state was not a nominal party on the record, the suit did not fall within the prohibition of the Eleventh Amendment, and that a decree should be made against the officers who were assuming to act under said unconstitutional law. Further, that, in view of the irreparable character of the injury threatened, injunction was the only adequate remedy.

It is true that the requirement that the state must be a nominal party on the record in order to obtain the protection of the Eleventh Amendment, has been modified by subsequent decisions. But the suit must still be in effect against the state. In the case at bar, the State of Tennessee is not a nominal party to the suit. The question then arises whether the bill of plaintiff in error was in fact against the State of Tennessee, within the meaning of said Eleventh Amendment, or in such sense that said state could constitutionally prohibit same when necessary to protect the enjoyment of a Federal right.

Cases of the class in which it has been held that actions against state officers to restrain them from the commission of wrongful acts to the prejudice of plaintiff's rights are not suits against the state are very numerous, and seem to cover the entire ground in controversy in this case.

Davis v. Gray, 16 Wall. 203.

Pennoyer v. McConnaughy, 140 U. S. 10.

Hans v. Louisiana, 135 U. S. 1.

Board of Liquidation v. McComb, 92 U. S. 531.
Poindexter v. Greenhow, 114 U. S. 270.
United States v. Lee, 106 U. S. 196.
Williams v. U. S. States, 138 U. S. 514.
Re Tyler, 149 U. S. 164.
Cummings v. Merchants National Bank, 101 U. S. 153.
Dodge v. Woolsey, 18 How. 331.
Reagan v. Farmers Loan & T. Co., 154 U. S. 362.
Scott v. Donald, 165 U. S. 107.
Belknap v. Schild, 161 U. S. 107.

In Charles River Bridge v. Warren Bridge, 11 Pet. 572, in an action against a corporation acting as agent collecting tolls under an unconstitutional law, it was held that jurisdiction was not taken away, since the state was not a party to the record.

In Davis v. Gray, 16 Wall. 220, a bill was sustained, filed by a receiver of a railway, to enjoin state officers from destroying the company's property by granting it to other parties on claim of forfeiture.

In United States v. Lee, 105 U. S. 212, it was held that officers and agents of the United States may be sued, where acting under unconstitutional laws, although the government cannot be sued.

In Pennoyer v. McConnaughy, 140 U. S. 10, it was held that a suit in equity by a purchaser against the state board of land commissioners was not a suit against the state, within the constitutional prohibition.

In W. U. Tel. Co. v. Henderson, 68 Fed. R. 590, it was held that a suit to restrain a state auditor from transmitting property values to county auditors for taxation, under an alleged void statute, was not a suit against the state.

Ejectment will lie against an officer of the United States, in possession of demanded premises on behalf of the government.

Polack v. Mansfield, 44 Cal. 42.
King v. LaGrange, 61 Cal. 228.

Tax sale proceedings may be reviewed where the property was struck off to the state as purchaser.

Budd v. Houston, 36 La. Ann. 961.

A state officer or commission will be enjoined from levying tax on manufactures in the guise of a charge for tags on packages.

Blanton v. So. Fertilizer Co., 77 Va. 337.

A stockholder in a bank, resident of another state, can maintain a bill in the Federal court against said bank and a state officer charged with the collection of an invalid state tax.

Dodge v. Woolsey, 18 How. 345.

Property levied upon by a sheriff under a state law, invalid because violative of the Constitution of the United States, may be replevined in the state court, and this court will take jurisdiction upon writ of error.

Wilmington, etc., R. Co. v. Read, Sheriff, 80 U. S. 264.

The Circuit Court of the United States will entertain a bill against a state auditor and county collectors to enjoin the collection of taxes levied upon a corporation in violation of charter exemption amounting to a contract within the meaning of the Federal Constitution.

Tomlinson v. Branch, 82 U. S. 460.
Charleston v. Branch, 82 U. S. 470.
Humphrey v. Pegues, 83 U. S. 244.

Upon writ of error to the supreme court of a state, *this court will compel the state court to entertain an injunction bill against the state collector of revenue,* who is attempting to collect such unconstitutional tax.

Home of the Friendless v. Rouse, 75 U. S. 430.
Washington University v. Rouse, 75 U. S. 439.

Where a state officer specially charged with the execution of a state enactment, which is alleged to be unconstitutional, is about to commit or is committing some specific wrong or trespass to the injury of the plaintiff's rights, a suit may be maintained against him, and he may be enjoined, where that relief is necessary.

Poindexter v. Greenhow, 114 U. S. 270.
Allen v. B. & O. R. R. Co., 114 U. S. 311.
Re Tyler, 149 U. S. 164.
Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362.
Scott v. Donald, 165 U. S. 58.
Smyth v. Ames, 169 U. S. 466.
Virginia Coupon Cases, 114 U. S. 314.
Belknap v. Schild, 161 U. S. 18.
Tindall v. Wesley, 167 U. S. 220.

It is true that it has been frequently held that mandamus will not lie to compel a state officer to carry out a contract of the state. This would clearly be coercing the state, through her officers, by legal process.

Louisiana v. Jumel, 107 U. S. 756.
Haygood v. Southern, 117 U. S. 70.
Virginia Coupon Cases, 114 U. S. 336.

The distinction, however, between such proceedings and suits to enjoin *unconstitutional aggression* by state officers upon private property is obvious.

In ex-Parte Ayres, 123 U. S. 443, the court, through Mr. Justice Matthews, after reviewing practically all cases upon the subject, very clearly pointed out this distinction, and stated what may be regarded as the final conclusion of the court upon this question, as follows:

> "Whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, but by a consideration of the nature of the case.
>
> For a breach of its contract by the state, there is no remedy by suit against the state itself, and a bill the object of which is by injunction indirectly to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, is a suit against the state.
>
> In such a case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still in substance, though not in form, a suit against the state.
>
> Suits are justifiable against individual defendants who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs; and against officers in their official capacity, either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial."

We quote from the opinion in the last-named case, as follows:

> "But this is not intended in any case to infringe upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity, either to arrest or direct their official actions by injunction or mandamus, where such suits are author-

> ized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. * * * In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."
>
> Ex-Parte Ayres, 123 U. S. 506.

A suit against persons claiming to act as officers of a state who, under color of an unconstitutional statute, commit injury to plaintiff's property, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, is not, within the Eleventh Amendment, an action against the state.

Scott v. Donald, 165 U. S. 58.

An *injunction* to restrain executive officers of a state from continued and repeated acts of trespass in seizing and carrying away and confiscating for the use of the state the imported property of the complainant, under alleged authority of an *unconstitutional statute,* is not invalid on the ground that it is a proceeding against the state, or that it interferes with official discretion.

Scott v. Donald, 165 U. S. 107.

The language of the court in the above case, as to granting injunctive relief, is especially applicable to the case at bar:

> "The bill prays for an injunction, on the several grounds of irreparable damage; that the acts complained of prevent the exercise by the complainant of his right to import without molestation lawful commodities, the products of other states; to avoid multiplicity of suits; the want of adequate remedy at law.

> The objections to proceedings against officers by injunction are, that it is in effect proceeding against the state itself, and that it interferes with the official discretion vested in the officers. The answer to such objections is found in a long line of decisions of this court."
>
> Scott v. Donald, 165 U. S. 127.
>
> "A suit to restrain the interference by a state corporation commission with the property and interstate business of a railway company, upon the assumed authority of a state statute, which the bill alleges to violate rights of the railway company protected by the Constitution of the United States, is not in any proper sense a suit against the state."
>
> McNeill v. Southern R. Co., 202 U. S. 543.

In the case of Lynn v. Polk, 8 Lea (Tenn.) 121, the *Supreme Court of Tennessee* held that an officer of the state, while executing an unconstitutional act, is not acting by authority of the state. Hence, taxpayers, citizens of the state, might maintain a bill *quia timet* to restrain the executive officer of the state from funding the public indebtedness, under a null and void act.

In defense of the bill in that case, the defendants relied upon the same act of 1873, set up in the demurrer of defendant in error in this case, which forbids a suit against the state, or an officer of the state acting by authority of the state. But the Supreme Court of Tennessee said:

> "The authority of the state can only exist in a commission or command issued or given in conformity to the requirements of the constitution. A legislature is the creature of the constitution, and cannot rise above or go beyond it. The constitution is its chart and guide, and by it the legislature must be governed and controlled. Whenever the lawmaking power violates the constitution, its act is a nul ity, and, being a nullity, is not an authority of the state. * * * A law unconstitutional is void,

> and confers neither right nor authority. Officers created by it are wrong-doers whenever they attempt its execution. I am compelled to confess my utter incompetency to comprehend the reasoning upon which it has been holden that unconstitutional enactments may be or must be treated as authority of the state. To my mind, it is the climax of absurdity."
>
> Lynn v. Polk, 8 Lea (76 Tenn.) 129-131.

While not questioning the authority of the above case, the Supreme Court of Tennessee attempted to distinguish the case at bar, upon the theory that the bill of plaintiff in error does not unqualifiedly attack the constitutionality of the Tennessee inspection law, but merely charges its unconstitutionality if it be applied to the oil in question. But the bill does charge that in any event the *threatened inspection of said oil is unlawful.*

Trans. p. 4.

It is difficult to comprehend how the position of defendant in error is improved, and his immunity from suit secured, by the claim that in this matter he is acting wholly beyond the scope of the Tennessee inspection law, and therefore without even color of authority.

If he is attempting to inspect oil which he is not authorized to inspect by the statute of Tennenssee, he certainly does not represent the state, nor is he "acting by the authority of the state;" and hence is not within the protection of the act of 1873. The above distinction sought to be made by the Supreme Court of Tennessee has been held by this court to be unsubstantial.

In the case of Poindexter v. Greenhow, 114 U. S. 270 (one of the Virginia Coupon Cases), it was held as follows:

> "The law of Virginia, being unconstitutional, is *no law;* this strips the defendant of his official char-

acter, and convicts him of a personal violation of the plaintiff's rights, for which he must personally answer.

It is no objection to the remedy in such cases that the statute *is not void on its face,* but is complained of only because its operation in the *particular instance* works a violation of a constitutional right; for the cases are common where the tax laws of a state, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional *regulations of commerce,* or as violations of contracts prohibited by the constitution, or because in some other way they operate to *deprive the party complaining of a right secured to him by the Constitution of the United States.*"

In Wilmington, etc., v. Alsbrook, 146 U. S. 279, the state court conceded the validity of a certain contract of exemption from taxation, but held that the particular property sought to be taxed was not within the terms of said exemption. Upon motion to dismiss a writ of error in this court, it was said:

> "In arriving at its conclusions, however, the *state court gave effect to the revenue law of* 1891, and held that the contract did not confer the right of an exemption from its operation. * * * The writ was properly allowed."

A state cannot, by forbidding suits against its officers, or by closing its courts to suits of a certain character, infringe rights guaranteed by the Federal Constitution, or deprive persons entitled to such rights of an effective method of asserting and obtaining the same. The various laws passed by the State of Virginia for the purpose of embarrassing the remedy of holders of state bonds and coupons, are set forth in what is known as the Virginia Coupon Cases. The substance of these decisions is that the denial by a state of an adequate remedy for

the enforcement of a federal right is equivalent to the denial of the right.

In the case of Poindexter v. Greenhow, above cited, it was held that the remedy of a holder of coupons, who had tendered same in payment of taxes, could not be limited to payment of said taxes and a suit for their recovery.

In the case of Chaffin v. Taylor, 114 U. S. 309, a suit of trespass *de bonis* brought in a similar case by a holder of such coupons against the tax collector was dismissed by the State Supreme Court, upon the grounds, (1) that the tax collector was forbidden to receive coupons by the law of Virginia, and (2) that an action of trespass against such collector was forbidden by the act of 1884. This court, in reversing said case, said:

> "It is not denied that but for these (unconstitutional) acts, trespass would lie under the Virginia law."

PLAINTIFF IN ERROR ENTITLED TO INJUNCTIVE RELIEF IN THIS CASE.

Many of the cases above cited hold that a person about to sustain irreparable injury by the execution of an unconstitutional law may obtain relief by injunction against state officers charged with the execution thereof.

> "Remedy by injunction to prevent distraint (of rolling stock of railroad) after tender of taxes is sanctioned by repeated decisions of this court, and has become common and unquestioned practice in similar cases, where exemptions have been claimed in virtue of the Constitution of the United States; the ground of the jurisdiction being that there is no adequate remedy at law."
>
> Allen v. Baltimore & Ohio R. R., 114 U. S. 311.

To same effect—

Board v. McComb, 92 U. S. 531.
Trans. Co. v. Parkersburg, 107 U. S. 691.
McCullough v. Virginia, 172 U. S. 111.
Pennoyer v. McConnaughy, 140 U. S. 9.

That injunction is the proper remedy under the Tennessee law against the execution of an unconstitutional act, is shown by the case of Lynn v. Polk, 8 Lea 21, *supra.*

In the case at bar, the bill not only alleges that plaintiff in error will sustain irreparable injury without injunctive relief, but states the various circumstances justifying that conclusion, to-wit: Continuing trespass and unlawful interference with its business by the defendant in error; the heavy penalties to which plaintiff in error would be subjected by a violation of the inspection law; the inability of plaintiff in error to recover inspection fees once paid to the state treasurer; and, even if suit for that purpose be permitted at all, the necessity of bringing a new suit every thirty days.

The Tennessee statute upon the subject of payment of taxes under protest provides as follows:

> "The party paying said *revenue* may, at any time within thirty days after making said payment, and not longer thereafter, sue said officer having collected said sum for the recovery thereof."
> Shannon's Code, section 1061.

The act permitting such suits limits the same to suits for the recovery of *revenue.* Very probably it would be held that this act does not authorize a suit against the state or its officer for the recovery of inspection fees illegally paid, since these are not collected as revenue. Furthermore, the monthly suit above provided for would be wholly inadequate for the protection of plaintiff in error in this case.

Inasmuch as the plaintiff in error, a resident of Tennessee, could not in this case maintain a suit in the Federal court for injunctive relief, the refusal of the state court to entertain its bill for that purposes deprived plaintiff in error of its only adequate remedy against infringement of the rights claimed under the Constitution of the United States.

For the reasons above set forth, we respectfully submit that the Supreme Court of Tennessee, by refusing to entertain this suit, manifestly deprived plaintiff in error of such rights as it might have in the premises under the Federal Constitution, and that the action of said court in dismissing said bill is subject to review by this court.

II.

Interstate Commerce.

Coming to the merits of the case, as presented by the bill, plaintiff in error contends:

(a) *That the oil in both of the tanks described in the bill is engaged in and a part of interstate commerce while in Tennnessee.*

(b) *That the inspection thereof is an interference with interstate commerce, such as is contrary to the Constitution of the United States.*

As a general proposition, it is conceded that when goods start on their journey from state to state they become interstate commerce, and are protected from interference or regulation by any state through which they may pass until they reach their ultimate destination;

notwithstanding on the way they may be delayed for a reasonable time on account of inadequate means of transportation, or for reshipment, or *assortment, or distribution,* or on account of any accident, or any other cause which may intervene to prevent the goods going directly from the initial point of shipment to the point of destination.

Coe v. Errol, 116 U. S. 517.
Kelley v. Rhodes, 118 U. S. 1.
State v. Engle, 5 Vroom (N. J.) 435.
State v. Corrigan, 10 Vroom (N. J.) 35.
The Daniel Ball, 10 Wall. 557.

> "Goods on their way through a state from a place outside thereof to another place outside thereof, are in course of interstate, or foreign, commerce, and are not taxable by the state through which they are passing, even though detained within that state by low water or other temporary causes."
> Coe v. Errol, 116 U. S. 516.

Applying the above well-settled principles to our case, it is very clear that the oil in Tank No. 1 during the whole of its stay in Tennessee is the subject of interstate commerce, for this oil is actually in transit from the time it leaves the States of Pennsylvania and Ohio until it is delivered to its owners in the States of Arkansas, Louisiana and Mississippi. The delay at Memphis is merely for the purpose of separation, distribution and reshipment, and is no longer than is required by the nature of the business and the exigencies of transportation. The only difference between the oil in Tank No. 1 and that in Tank No. 2 is that the latter is not actually sold before being shipped from Pennsylvania and Ohio, and in a certain sense it is held in Tennessee awaiting sales in other states; but at the time of the shipment of

this oil it is as certain that none of it is to be sold, or to remain, in the State of Tennessee as in the case of the oil in Tank No. 1, so that this oil is never really *at rest* in Tennessee, and its interstate transit is never finally ended at Memphis, but is only *temporarily interrupted.* This fact brings the oil in this tank also within the general description of interstate commerce, as laid down in the foregoing authorities.

It has been more difficult than might have been anticipated to find cases similar or even analagous in facts to the case at bar, in which the question of interstate commerce was considered. We have, however, found a few in which the conditions were substantially similar, and will quote from these at some length, and also from others in which general principles were laid down which seem to cover this case.

Perhaps the leading case presenting conditions similar to those in the case at bar is that of Coe v. Errol, 116 U. S. 516. In that case a petition was filed to abate certain taxes imposed upon logs by the State of New Hampshire. It appeared that the petitioners had cut large quantities of timber at various points in New Hampshire and collected the same near the town of Errol, intending to float the same during high water down the Androscoggin river to Lewiston, Maine. It also appeared that with these logs were a number of other logs cut at points in the State of Maine and thence floated down the lakes and rivers to Errol; that for many years the petitioner had carried on business in that way, and the timber thus cut had always lain over one season, being about a year at said point in the Androscoggin river. It seems that the logs cut in Maine and those cut in New Hampshire were

treated in practically the same way, all being collected at Errol, as an entrepot, all held there about the same length of time, and all shipped to Lewiston together.

The Supreme Court of New Hampshire held those logs cut in New Hampshire taxable, but abated the tax as to those cut in Maine. The decision was affirmed by this court, it being held that the New Hampshire logs had not begun their journey, and that the mere intention to export them did not make them interstate commerce. Referring to these New Hampshire logs the court said:

> "This question does not present the predicament of goods in transportation through a state, though detained for a time within the state by low water or other causes of delay, *as was the case of logs cut in the State of Maine*, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in course of commercial transportation, and are already clearly under the protection of the Constitution."
>
> Coe v. Errol, 116 U. S. 525.

This is particularly applicable to the case at bar, because in this case all of the oil in said tanks is merely shipped through Tennessee; that is, none of it started from Tennessee and none of it comes to rest in Tennessee. It is, of course, well settled that mere intention, and even preparation to export articles, does not make them the subject of interstate commerce; nor do they continue to be interstate commerce, so as to be exempt from all state interference, after they have come to rest at their final destination. But during their transportation from state to state, and while they are in any intermediate state in which there is no intention to finally leave them, as in the case of the Maine logs above, they continue to be interstate commerce, even in spite of long delays.

In the case of Kelley v. Rhoads, 188 U. S. 1, it was held that sheep driven at a reasonable speed from a point in Utah across Wyoming, to a point in Nebraska—a distance of about five hundred miles—are properly engaged in interstate commerce, so as to be exempt from taxation in Wyoming, even though it appeared that they subsisted during their journey by grazing along the way.

In the case of Swift & Company v. United States, 196 U. S. 375, it was held that trade in fresh meat is sufficiently shown to be commerce among the States, protected from restraint by the Sherman Act, by allegations in a bill charging meat dealers with violations of that act, which, even if they import a technical passing of title at the slaughtering places in cases of sales, also import that the sales are to persons in other states, and that the shipments to other states are pursuant to such sales.

The court, speaking through Mr. Justice Holmes, said:

> "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated * * * It should be added that the cattle in the stock yard are not at rest even to the extent that was held suf-

ficient to warrant taxation in American Steel & Wire Co. v. Speed, 192 U. S. 500."

The facts of the above case as to temporary interruption of transit are closely analogous to those of the case at bar. The court held that, *even though there might be a sale* during such interruption, nevertheless the fact that after purchase the transit of said cattle would be resumed was sufficient to preserve their character as interstate commerce. This covers in all particulars even the oil in Tank No. 2 in this case, which has not been sold when brought to Tennessee.

In the case of Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, the brewing company filed its bill to enjoin the beer inspector of the State of Missouri from attempting to collect certain inspection fees upon beer shipped into that state, and especially averred that, so far as the law imposed a charge on beer shipped from Wisconsin into Missouri, and held there by the consignee for sale and shipment for consumption in other states, the Missouri law was repugnant to the commerce clause of the Constitution of the United States.

This court held that said bill could not be maintained because of provisions of the Wilson Act. From the opinion it seems to have been conceded that but for said act the brewing company would have been entitled to the relief sought. This appears also from the dissenting opinion of Mr. Justice Brown, concurred in by Mr. Justice Brewer and Mr. Justice Day, in which the position was taken that the Wilson Act did not apply in that case.

The case of State v. Engle, 5 Vroom (N. J.) 425, is directly in point, and to the extent of the persuasive authority of the Supreme Court of that state, seems con-

clusive of this question. In that case a company owning coal lands in Pennsylvania sent coal mined on their lands by railroad to Elizabethport, in New Jersey, where it was deposited on the wharf for separation and assortment, for the purpose of being shipped in vessels to purchasers in New York and New England. It was held by the Supreme Court of New Jersey that this coal, while at Elizabethport, was the subject of interstate commerce, and not subject to taxation by the State of New Jersey. We quote as follows from the opinion of the court:

> "When a cargo of one size is obtained it is shipped to points in New England, or up the Hudson river, as soon as a vessel can be chartered to carry it. None of the company's coal is sold for consumption at Elizabethport. * * * Orders from purchasers were generally obtained before the coal left the mines, and the sales were for delivery on board vessels at Elizabethport."

The court says this property was:

> "*Delayed within the State, not for the purpose of sale, but merely for separation and assortment,* for the convenience of shipping to its destination. * * * That a tax on it is a tax on commerce among the states is too plain to require argument."

The court further calls attention to the fact that if the State of New Jersey be permitted to impose a tax upon said coal, then every state through which it passed would have an equal right to impose a similar tax, and thus commerce between the several states might be overwhelmed with the burdens of taxation. The applicability of the above to the case at bar is obvious. If the State of Tennessee has a right to inspect the oil in said two tanks while it is in transit from the States of Pennsylvania and Ohio to the States of Arkansas, Louisiana and Mississippi, then every state through which it passes would

have the same right. The fact that Memphis is used as a point for distributing said oil to meet the requirements of the various orders for same in the States of Arkansas, Louisiana and Mississippi, in no way gives the State of Tennessee a superior right in regard to said oil over and above the right of the other states through which it passes. It is true that the oil may remain in Tennessee *longer* than in those other states, but in considering the question whether this oil is in course of transportation while in Tennessee we must take into consideration the nature of the oil itself and of the coal oil business. The bill shows that on account of the nature of oil and its tendency to leak and evaporate it cannot be shipped great distances in barrels, but can only be shipped in railroad tank cars, and also that these cars cannot be sent to every place where there may be an order for a small amount of oil. Thus, in the very nature of things, it is necessary that the oil be *rehandled* at some point. It is just as much in the course of transportation, and is just as much protected by the interstate commerce clause of the Constitution of the United States while being so handled as while actually in motion toward its destination.

The case of State v. Carrigan, 10 Vroom (N. J.) 35, was in regard to a similar state of facts as the case last mentioned, and the decision of the court was in all respects the same.

As tending to show that the oil in question is not interstate commerce defendant in error relied in the State courts upon the following cases:

The case of Willis v. Standard Oil Co., 50 Minn. 290, was cited as holding that "a statute that provides for

the inspection of illuminating oil in railroad tank cars is valid." An examination of that case shows that the oil held liable to inspection was to be sold in the state, and the court expressly said that but for this fact said oil would have been *interstate commerce and not subject to inspection.* The lower court held that the oil not intended for sale in Minnesota was not subject to inspection, and this was approved by the Appellate Court. We quote from the opinion:

> "The objection is also made that the law is in violation of the Constitution of the United States as an interference with interstate commerce. If it were applicable to the oil inspected while in transit through the state and not intended for sale or use within it, the law so far as thus applicable would interfere with interstate commerce. But we are to presume that the Legislature did not intend it to apply so as to interfere with the exclusive jurisdiction of Congress."

This decision, insofar as it refers to oil *not to be sold in Minnesota,* is express authority for the proposition that such oil is interstate commerce, and not subject to inspection in that state.

The case of Pittsburg Coal Co. v. Louisiana, 156 U. S. 590, was cited as holding that "a law requiring the gauging of any coal or coke boat in any port of the state, with a fee to the gauger, is not an unconstitutional regulation of commerce." But an examination of that case shows that under said act the gaugers were not required to gauge any boat until "called upon for that purpose." * * * "The law also declared that no boat load of coal or coke should be sold in the city or state until it had been inspected, as provided for in the act." The suit was to recover a penalty for selling a boat load of coal *in*

New Orleans in violation of the act. Thus it appears that the act required the gauging only of such coal as was sold in Louisiana, since there was no provision for a general inspection, and the act provided a penalty only in case of sales in Louisiana. This being so the state could, of course, pass the act as a valid exercise of its police power for the protection of its own citizens.

The case of Patapsco v. Board of Agriculture, 171 U. S. 345, was relied upon, but as matter of fact the question of interstate commerce was not extensively discussed therein, the main contention being over excessiveness of inspection charges. This court held that if an inspection charge be found so excessive as to justify the conclusion that the law was intended for revenue purposes the act cannot be sustained. This case holds, further, that valid inspection laws can be passed by a state, in the exercise of its police power, only for the protection or ultimate benefit of its own citizens; and if the act has no relation to these objects it cannot be sustained.

This is the very principle upon which we rely in a later portion of our brief.

Counsel also sought in the state courts to bring this case within the decision of the case of American Steel & Wire Co. v. Speed, 192 U. S. 500, in which was involved the validity of a tax imposed by the State of Tennessee upon goods of said company held in Memphis for sale in Tennessee and other states. Without reciting at length the facts of that case we note the following essential differences between that and the case at bar:

1. In that case there was never any separation of the goods sold, or to be sold, in Tennessee from those sold or to be sold in other states, so that any article kept on hand

in the stock at Memphis was liable, under the company's custom of doing business, to be sold; (a) in Tennessee and (b) without any previous order or contract. It necessarily followed, therefore, that each and every article in that stock had *come to rest* in Tennessee, in that it was held in Tennessee for an uncertain time and might be sold in that state. Each article of that stock was as much a part of the "mass of property" of Tennessee as if it had never been in any other state. Its transit had ceased as completely as if it had never been in transit. There was neither contract for nor intention of forwarding any particular keg of nails or coil of wire, or any *designated lot* of those commodities, to any other state, or of using same to fill any special order.

In the case at bar, on the other hand, it is settled at the time of the shipment from Pennsylvania and Ohio of the oil in said two tanks that none of it will ever reach its final destination in Tennessee, or be mingled with the "mass of property" in that state; and this intention is strictly carried out.

2. In the Steel & Wire Co. case, while the proof shows that although most of the company's goods were sold outside of Tennessee and a considerable amount of what was called "previous contracts," still, as above stated, any article on hand might be sold to Memphis customers, and regular customers of the company could purchase without previous contract.

In our case, as above stated, none of the oil in either of the said tanks is sold in Tennessee; and that for which there are previous orders is effectively separated from that for which there are no such orders.

3. In deciding the Steel & Wire Company case the Supreme Court of Tennessee reached the conclusion that inasmuch as any article might be sold in Tennessee and without previous order, therefore the whole stock might be considered as held for that purpose.

110 Tenn. (2 Cates) 545.

With this we fully agree, but the mere statement of the decision shows that it does not apply to our case.

4. This court, in affirming the decision of the Supreme Court of Tennessee in the Steel & Wire Company case, held that the goods in question had "arrived at their destination" and were "at rest" within the State, and were "enjoying the protection of its laws," and might therefore be taxed without discrimination, like other property within the state.

192 U. S., p. 500.

Of this we may say:

(a) That the right to tax was expressly predicated upon the above findings, and the court could not have granted this right unless it had found that the goods had arrived at their destination and were at rest within the state, which is not true of the oil in our case.

(b) That the right of the state to *tax* does not necessarily give the right to *inspect*. A careful reading of the opinion of this court shows that it nowhere held that interstate commerce in said goods had ceased for all purposes at the time said tax was imposed. In fact, it appears very clearly, from the opinion of the court, that if these gods had been imports from a foreign country no tax could have been imposed upon them in their then condition. The decision of the court rests upon the ground that uniform taxation of these goods under those

conditions was not a "regulation" within the meaning of that term, as used by Congress. This is reasonable, because, in return for the tax these goods, as stated by the court, were "enjoying the protection of the state laws."

It certainly would not follow that an exorbitant charge for an unnecessary inspection would not be a "regulation" of commerce; for in return for the inspection fee the owner of the oil gets nothing of value to him, and from the inspection the people of Tennessee derive no benefit. Such inspection, then, being unnecessary, is unreasonable, and is an unwarranted interference with commerce.

Counsel for defendant in error also cited Brown v. Houston, 114 U. S. 552. But the ground upon which the coal in that case was held subject to taxation was stated by the court as follows:

> "The coal had come to *its place of rest, for final disposal or use, and was a commodity in the market of New Orleans.*"

None of which is true of the oil in the present case.

In the cases of May v. New Orleans, 178 U. S. 496, and Austin v. Tennessee, 179 U. S. 342, it was likewise conceded that the goods in question had reached the state of their ultimate destination and were held for sale there.

ORIGINAL PACKAGE CASES.

Defendant in error, by the fifth ground of his demurrer, contends that the oil in these tanks is not interstate commerce, and is therefore liable to inspection, because not kept in the "original packages" in which it was brought into Tennessee; and opposing counsel cited many

cases in the state courts upon the subject of "original packages."

If the question of original packages be material, it may be observed that in view of the nature of the coal oil business this oil is as much in original packages as it is practicable to keep it. The fact is that in the ordinary course of business oil is not put up "in packages." The practical purpose of the original package rule is to prevent a commingling of the article contained in the package with the general mass of property in the state. This is accomplished in the case at bar as well as it can be accomplished in the practical oil business by placing the oil not to be used in Tennessee in the separate tanks mentioned.

But aside from this we think the original package doctrine and the many cases upon that subject wholly inapplicable. The question here is, rather, whether the oil has reached its final destination, or is still in course of transit so as to be interstate commerce. In all cases where the question of "original package" was considered it was conceded that the goods had reached the state of their ultimate destination and were *at rest,* so far as further transportation was concerned; but the right to sell these imported goods in that state, in the original packages in which they were shipped, was claimed as a necessary incident to the right to ship them in—that is, as an essential part of the interstate commerce transaction. This court, in the "original package" cases, of which Leisy v. Hardin, 135 U. S. 100, is one of the most noted, sustained this contention, holding that such goods could be sold in the original packages in spite of state prohibition. In other cases it was held that after the original packages had been broken *in the state of final*

destination, and the goods commingled with the general mass of property in the state, the right of sale, as an incident of the right to import was gone, and that the state could then regulate or prohibit such sales without interfering with interstate commerce.

Thus the question in all those cases was whether the goods, by the breaking of the package, had become commingled with the mass of property, it being conceded that they were otherwise at rest in the state of their final destination.

The above doctrine, of course, has no application to a case where the goods never come to rest in the state and are not intended for sale therein; nor has the court ever held that the breaking of the original package necessarily shows that the transit of the goods has ceased and that they are at rest at the point where such package is broken.

In the case at bar it is conceded that none of the oil in said two tanks will finally remain in Tennessee; the question is whether said oil while in Tennessee is in transit or at rest. With this question the original package doctrine has nothing to do: the question involved is rather analogous to those involved in the following cases hereinbefore cited:

1. Coe v. Errol, 116 U. S. 516.
2. Kelley v. Rhoads, 188 U. S. 1.
3. State v. Engle, 34 New Jersey Law 425.
4. American Steel & Wire Co. v. Speed, 192 U. S. p. 500.

In all these cases the question was whether the goods were in transit or at rest. In the case of the logs in the first case and the sheep in the second the articles, of

course, were not put in packages. In the third case mentioned the coal was brought into New Jersey in cars and then distributed; hence the original package was broken.

The case of Caldwell v. North Carolina, 187 U. S. 622, best shows the inapplicability of the original package doctrine; that was one of the so-called "sales by sample" cases, and the court held that the fact that in filling orders the pictures were brought into North Carolina in one package and the frames in another, and these two packages were then broken and the pictures and frames put together by the shipper's agent, did not deprive the transaction of the character of interstate commerce or render it taxable, because the goods were practically still in transit, and had not reached their destination at the time the packages were broken.

On the other hand, in the case of the Steel & Wire Co. v. Speed, *supra*, it was conceded that the goods were still in the original packages at the time they were taxed, but the court held them subject to taxation because the proof showed that they had reached their final destination, and were held for sale in Tennessee.

Thus it is seen that the breaking of the original package has no bearing upon the question of interstate commerce involved in such a case as that at bar.

III.

Police Power.

It is, of course, contended by defendant in error that the charge imposed under the Tennessee inspection law is not a tax or an interference with interstate commerce, but is a mere inspection law enacted by the State of Tennessee in the exercise of its police power. The right of

a state to enact reasonable inspection laws for the protection and benefit of its own citizens, that is, laws which will guard their health or safety or prevent fraud or imposition upon them, or otherwise secure their welfare, must, of course, be conceded. It is also true that such bona fide inspection laws may, in certain cases, incidentally and slightly affect interstate commerce by their operation upon commodities engaged therein.

But, in order to be valid, a so-called inspection law must be such *in fact*, and must be enacted for the purpose and must be calculated to accomplish the ends for which valid inspection laws may be enacted. It is perfectly clear that the Tennessee Act of 1899, if construed to apply to any of the oil contained in the two tanks mentioned in the bill, is not a valid inspection law, and the inspection of said oils thereunder is not a valid exercise of the police power of Tennessee, and to that extent said act is unconstitutional and void:

1. Because none of said oil is sold in Tennessee, and none of it is manufactured in Tennessee. Hence the inspection thereof is unnecessary to protect either the citizens of Tennessee or the reputation of her manufactured products abroad.

2. The fees provided by said act are unreasonable and exorbitant, and very much greater than necessary to provide for the expense of such inspection, so that the treasury of Tennessee annually receives a large surplus therefrom, which is diverted to other purposes.

The mere fact that a state statute is enacted in good faith as an exercise of the police power will not render it valid if it in fact amounts to a regulation of interstate commerce.

17 A. & E. Enc. Law 75.
Bowman v. Chicago, etc., R. Co., 125 U. S. 465.
State Freight Tax Case, 15 Wall. 232.

It is for the courts to determine what state action is or is not a regulation of interstate commerce.

Id., p. 75.
Leisy v. Hardin, 135 U. S. 100.

A state statute will be construed, if possible, so as not to amount to an interference with interstate commerce.

Id., p. 76.

There are many cases where statutes broad enough to include both local and interstate commerce have been held to apply to only the former, because otherwise unconstitutional.

Id., p. 76.
Louisville, etc., R. Co. v. Mississippi, 133 U. S. 587.

Local police laws which may be enacted by the States have their source in the powers which the states reserved and never surrendered to Congress, of providing for the public health, the public morals and the public safety. All state legislation regulating or affecting interstate commerce must, in order to be valid, be enacted in pursuance of the police powers of the state.

Id., p. 56.

"It is a well settled rule that if a State statute purporting to have been enacted in pursuance of the police power to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the Federal Constitution. A mere invasion of the right of Congress to regulate commerce will not be tolerated. A state may not, under cover of

exercising its police powers, substantially prohibit or burden any foreign or interstate commerce."

Id., pp. 56-51.

Henderson v. New York, 92 U. S. 259.

Mugler v. Kansas, 123 U. S. 623.

"The reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court, whether such legislation encroaches upon national authority or is to be deemed a legitimate exercise of the (police) powers of the state to protect the public interests, or to promote the public convenience."

Lake Shore R. R. Co. v. Ohio, 173 U. S. 285.

A state law purporting to deal only with domestic matters, but being in effect and essence merely a regulation of interstate commerce, is void.

Hall v. DeCuir, 95 U. S. 485.

Neither the express declaration that a statute is passed in pursuance of the police power, nor the actual good faith of the state in passing it as such, are material, when the law is in fact an interference with interstate commerce.

Brennan v. Titusville, 153 U. S. 289.

Scott v. Donald, 165 U. S. 91.

A police regulation going beyond the necessities of the case and interfering with interstate commerce is void.

17 A. & E. Enc. Law, p. 57.

Missouri R. R. Co. v. Haber, 19 U. S. 613.

Hannibal, etc., v. Husen, 95 U. S. 473.

Bona fide inspection laws are valid; but a statute or ordinance requiring the inspection of commodities in transit through the state or municipality, and bound for points in other states, is void.

Id. 79, citing Georgetown v. Davidson, 6 D. C. 278.

"Inspection laws to be valid must be such in fact, and have some material tendency to secure the ends for which inspection laws are enacted."

Id., p. 79.

People v. Compagnie Generale Transatlantique, 107 U. S. 59.

"Where the inspection charge imposed is unreasonable, or excessive, it is void, as an interference with interstate commerce."

Id., p. 81.

Patapsco Co. v. Board, 171 U. S. 345.

A charge imposed for the express purpose of executing an inspection law is void if the statute is not, in fact, a valid inspection law.

People v. Edye, 11 Daly (N. Y.) 132.

Inspection laws, like quarantine and sanitary laws, may be enacted by virtue of the police power of the states and are governed by the same principles and restrictions.

In case of quarantine and sanitary laws a state cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory.

17 A. & E. Enc. Law, p. 83, citing Hannibal v. Husen, 95 U. S. 465.

The case last above cited is a leading authority upon the subject of quarantine, inspection and sanitary laws. In that case it was held that while a state may enact reasonable sanitary and inspection regulations and prevent persons and animals having contagious or infectious diseases from entering the state, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory.

Hannibal v. Husen, 95 U. S. 465.

"Since the range of a state's police power comes very near to the field committed by the Constitution

to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."
Id., p. 465.

Speaking in that case of the police power, Mr. Justice Strong said:

"What that power is it is difficult to define with sharp precision. It is generally said to extend to making legislation promotive of *domestic* order, morals, health and safety."
Id., p. 470.

In the case of Grimes v. Edye, 126 Mo. 168, it was held that a state could prohibit the importation of Texas cattle, because all Texas cattle are affected with or capable of imparting Texas fever, but that a state could not prohibit the shipment by rail through the state of such cattle, because in such case the danger of communicating the fever to native cattle is not sufficient to justify the prohibition of the Texas cattle.

This is much in point as showing that a statute enacted under the police power of a state may be constitutional in a case where it is necessary, and unconstitutional where it is not necessary. In the case at bar certainly there can be no danger to the citizens of Tennessee from the transportation through Tennessee of uninspected oil, and a statute requiring the inspection of such oil would be void because unnecessary.

A statute requiring all sheep brought into the state to be inspected and dipped, whether sound and healthy or not, is void as an interference with interstate commerce.
State v. Duckworth, 39 L. R. A. 365.

In Hannibal v. Husen, 95 U. S. 465, the absolute exclusion of all Texas cattle from Missouri at certain seasons

of the year was held to be an improper exercise of the police power, because going beyond the necessities of the case.

"Of course quarantine and health laws must have some real relation to the objects named in them in order to be sustained as valid exercises of the police power."

17 A. & E. Enc. Law, p. 83.

"If the prohibition is unnecessary to guard properly against the danger feared it will be void as an interference with interstate commerce."

Id., p. 84.

It is a question for the court to determine whether or not a prohibition extends beyond the danger to be apprehended.

Id., p. 84.

The police power is "founded upon the duty of the state to protect its citizens and to provide for the safety and good order of society. It corresponds to the *right of self-preservation* in the individual."

22 A. & E. Enc. Law 918.

The police power must be exercised subject to the provisions of both the Federal and State Constitutions.

Id., p. 937.

It cannot be used as a cloak for the invasion of personal rights or private property.

Id., p. 939.

The police power of a state is for the safety, health, morals, comfort and welfare of its citizens. And it shall not arbitrarily and unreasonably affect the citizen in his life, liberty and property.

Harbison v. Knoxville Iron Co., 103 Tenn. 423.

In Farris v. Henderson, 1 Oklahoma (33 Pac.) 381, it was held that an inspection law providing for an inspec-

tion of all stock driven through Beaver county, and a payment of so much per head for such inspection, was an unwarranted interference with interstate commerce and void.

The above well settled principles are cited merely to show their applicability to the case at bar. From the above authorities the following appears:

1. That the police power of a state, being indentical with the right of self-defense, can be exercised only for the protection or benefit of the citizens of that state.

2. That the exercise of the police power can affect interstate commerce only so far as is absolutely necessary.

3. That inspection laws, being an exercise of the police power, must be intended for the protection or benefit of the citizens of the state enacting same, and must have some substantial relation to their safety, happiness or betterment.

4. If a so-called inspection law is not reasonably calculated to benefit the citizens of that state it is void.

Inasmuch as none of the oil in tank No. 1 or tank No. 2 is manufactured in Tennessee, and none of it is to be sold or consumed in Tennessee, how can the State of Tennessee, or its citizens, be benefited by an inspection of said oil? Certainly there is no necessity, from their standpoint, for having it inspected. If, then, this oil while in Tennessee be the subject of interstate commerce, any interference with it by way of inspection is an unnecessary interfering by the State of Tennessee with interstate commerce, and the law providing for such interference, not being a valid exercise of the police power of that state, is unconstitutional and void.

In the case of Reelfoot Lake Levee District v. Dawson, 13 Pickle (97 Tenn.) 152, the Supreme Court of Tennessee considered the constitutionality of a special assessment for the purpose of building and maintaining a levee and said:

> "Complainants contend, in the next place, that if the act be not sustained under the taxing power, it can be and should be sustained under the police power of the state. This latter power, like the former one, is an attribute of sovereignty, and it may rightfully have expression in the form of legislation whenever needful for the promotion of public safety, order or well being. * * * Only those cases where regulation is the primary purpose can be properly referred to the police power. Obviously the burden intended to be laid on the property of the citizens by the act under consideration is not primarily for regulation. * * * Strictly speaking, it is without an element or feature of regulation. The health of the people in that locality might be somewhat improved, and even life itself might be saved occasionally by the construction of the contemplated levee, and the consequent prevention of periodical overflows; but those are the most remote of the benefits to be anticipated from such a work, and were likely not thought of by the members of the General Assembly.
>
> Without further enlarging upon the subject, we hold unhesitatingly that this legislation is in no sense referable to the police power of the state, and it cannot be justified thereunder."
>
> 13 Pickle 171-173.

All the above might well have been written of the present attempt to inspect oil with which the citizens of Tennessee have no connection, dealing or concern.

Said court has defined the police power and its scope as follows:

> "The first right of a state, as of a man, is self-protection, and with the state that right involves the universally acknowledged power and duty to enact

> and enforce all such laws, not in plain conflict with some provision of the state or Federal Constitution, as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people."
>
> Harbison v. Knoxville Iron Co., 19 Pickle (103 Tenn.) 441.

It is difficult to understand in what regard the inspection by the State of Tennessee of the oil in the two tanks mentioned in the bill is "necessary or expedient for the safety, health, morals, comfort or welfare of its people," or conducive to the "self-protection" and welfare of the state, *unless by way of increasing its revenues.*

DANGER IN CONSUMPTION ALONE TO BE AVOIDED.

That the Legislature of Tennessee did not intend to guard against the mere presence in the state of burning fluids of less than the required "flash test" is clearly shown by Section 10 of said inspection law, which provides:

> "All packages or barrels containing the fluids, which are plainly marked by the manufacturers or shippers 'naphtha,' 'benzine,' 'gasoline,' together with specific gravity of the fluids, may be permitted to go forward to their destination, as not intended for illuminating purposes."

The necessary conclusion from this is that the only danger intended to be guarded against was danger in *consumption for illuminating purposes.*

Furthermore, a court would doubtless hold that the danger from the mere presence of these oils in the state would be too remote to justify the state in requiring their inspection as an exercise of its police power.

Defendant in error contended in the state courts that the State of Tennessee had the right to require inspection of all of the oils placed in said two tanks, for fear that plaintiff in error might fraudulently sell oil therefrom to citizens of Tennessee, or within that state.

The bill unequivocally states that such sales have never been made and will not be made. It is a well settled principle that fraud will not be presumed.

Furthermore, in this case such a sale would be a violation of a criminal statute and subject plaintiff in error to heavy penalties. Certainly the court will not justify an undoubted interference with interstate commerce upon the ground of a mere fear or suspicion that otherwise plaintiff in error may hereafter, at some time, be guilty of a criminal act.

IV.

Tennessee Act Not Valid as an Inspection Law if Applied to this Oil.

Inasmuch as an inspection of the oil in the tanks mentioned in the bill can in no way benefit the State of Tennessee, or its citizens, it cannot be in fact a valid inspection law under the state's police power.

Various so-called inspection laws have been before this court. In the case of Pabst Brewing Co. v. Crenshaw, supra, the court held that, under the Wilson Act, it was precluded from considering whether or not the law in question could otherwise be sustained as an inspection law. It seems quite evident that but for said Wilson law the act would not have been sustained. The only difference between the majority of the court and the dissenting minority was as to the application of the Wilson Act;

hence the dissenting opinion of Mr. Justice Brown upon the general subject of inspection laws is in effect the opinion of the court. He said:

> "The obvious inefficacy of the inspection has an important bearing upon the more serious objection to this act, in that the fees for inspection bear no just relation to the expense and make it evident that the law was not passed in a *bona fide* exercise of the police power of the state, but as a convenient method of increasing the public revenues. * * * The facts of this case show that the inspection, as applied to malt liquors manufactured out of the state, was purely perfunctory, and accomplished nothing for the protection of its citizens."

Since the inspection in the case at bar can serve no useful purpose, it is very evident that this act, as applied to the oil in question, could only serve the purpose of increasing the public revenues of the State of Tennessee.

In the case of Vance v. Vandercook, 170 U. S. 438, the court held a so-called inspection law to be not such in fact.

In Read v. Colorado, 187 U. S. 137, this court said:

> "Certain principles are well settled by the former decisions of this court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect. Another is that a state may not, by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce."

In Passenger Cases, 7 How. 283, an inspection law requiring the masters of vessels to pay a certain sum on account of every passenger brought from a foreign country into the state, was held to be inoperative, although passed under the general denomination of a health law. It was said that although the amount of the tax was

small it might have been increased so as to become prohibitory, at the discretion of the Legislature.

In the cases of Minnesota v. Barber, 136 U. S. 313, and Brimmer v. Rebman, 138 U. S. 78, so-called inspection laws were held to be void as in restraint of commerce between the states.

The Supreme Court of Tennessee has not construed the act of 1899, if applied to the oil in question, to be a valid inspection law. Even if it had this court would not be bound by the declaration, since the Wilson Act does not apply.

Brennan v. Titusville, 153 U. S. 289.
Scott v. Donald, 165 U. S. 100.

In the state courts, counsel for defendant in error cited the case of Patterson v. Kentucky, 97 U. S. 501, as sustaining an act similar to the Tennessee act. But an examination of that case shows that it was sought to inspect thereunder only oil to be consumed in the State of Kentucky. In view of this, said act was very naturally upheld as an exercise by the State of Kentucky of its police power for the protection of its *own citizens*.

INSPECTION CHARGE EXCESSIVE.

The bill alleges that the charge for inspection under the Tennessee act is much more than is necessary for the expense of such inspection, and that therefore said law, if applied to the oil in question, is a mere tax under guise of an inspection law; or, at least burdens interstate commerce to an unnecessary extent.

Since interstate commerce can be burdened, even by valid inspection laws, only so far as is absolutely necessary, the courts may consider the alleged excessiveness

of any inspection charge; and, from such excessiveness, reach the conclusion that the law is, in fact, a revenue law under the guise of an inspection law.

Patapsco v. Board, 171 U. S. 345.

Postal Tel. Cable Co. v. Taylor, 192 U. S. 64.

Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U. S. 160.

In view of the allegations of the bill in this case as to the excessiveness of the inspection charge, plaintiff in error was at least entitled to a hearing by court or jury upon that point. With the demurrer confessing the allegations of the bill, it could not be said as matter of law that said inspection charge was not so excessive as to invalidate the law.

V.

Taking Property Without Due Process of Law.

If the so-called inspection law of Tennessee is not such in fact, and is not properly referable to the police power of that state, then the charge imposed thereunder is a mere penalty exacted of plaintiff in error, and amounts to depriving plaintiff in error of its property without due process of law, whether said oil is engaged in interstate commerce or not.

Particularly is this true where the State of Tennessee, while imposing said charge, at the same time, by the Act of 1873, prevents plaintiff in error from obtaining from the courts adequate remedy against this illegal exaction.

In conclusion, the attention of the court is again called to the fact that practical common sense and substantial justice must be against the needless and useless inspection of this oil, with which the State of Tennessee and its

citizens have no concern. Opposing counsel, in the state courts, referred to the action of plaintiff in error and this suit as a "scheme to escape the payment of inspection fees," apparently intending to convey the meaning that plaintiff in error is seeking by some trick or subterfuge to avoid the payment of charges justly imposed upon it. There is certainly nothing in the bill to warrant any such inference. It must be conceded that no practical good can come from an inspection of the Arkansas, Louisiana and Mississippi oil; and plaintiff in error states very frankly in the bill that it is advised that such oil "is not liable to inspection here if kept separate from the oil sold or intended to be sold in Tennessee." The bill further shows that plaintiff in error has paid all legal taxes, and also inspection fees upon its Tennessee oil. Under these circumstances there is no valid reason in law or morals why plaintiff in error should not in good faith present to the court the question of its liability for the payment of these inspection fees, which plaintiff in error believes to be merely unnecessary and oppressive penalties, from which neither it, the citizens of Tennessee, nor anyone else can derive any benefit.

Respectfully submitted,

THOS. B. TURLEY,

For Plaintiff in Error.

Tennessee Coal Oil Inspection Law.

CHAPTER 349, ACTS 1899.
HOUSE BILL No. 638.

AN ACT to provide for the inspection of illuminating oils and fluids.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the Governor shall appoint for each city or county in this State containing a population of one thousand and over an inspector of coal oil, carbon oil, petroleum, kerosene oil, gasoline, or any other product of petroleum used for illuminating or burning fluid, by whatever name known, which may be manufactured or offered for sale in the State. That said inspector shall be a competent and qualified person, and shall be provided by the State out of the funds from time to time in the office of the treasurer with the necessary instruments for the testing or inspecting of any such illuminating oils and fluids, which said instruments shall be the standard implements used for that purpose, and shall test all oils and fluids as follows:

First—The water cup shall have sufficient water in it to rise two-thirds up the side of the oil cup.

Second—Fill the oil cup with oil to be tested to within one-eighth of an inch of the top.

Third—Suspend the thermometer so the bulb is just under the surface of the oil.

Fourth—Use an alcohol lamp to heat the water bath, and before placing the light under the water cup, test the oil in the oil cup by bringing a lighted match in contact with the surface of the oil. If it does not ignite, place the lamp under the water cup, and slowly heat the oil, not slower than one degree of the thermometer in a minute, nor faster than two degrees of the thermometer in a minute, moving a lighted match across the surface of the oil at each degree the thermometer rises, not more than three-eighths of an inch from the surface of the oil. If the oil should flash—that is, a little gas burn on the surface and go out again, the degree indicated by the thermometer is the flash test of the oil. The flame moved across the surface of the oil should not exceed that of an ordinary match.

Sec. 2. Be it further enacted, That it shall be the duty of the inspector promptly to inspect or test all illuminating oils or fluids which are subject to inspection, as provided in this act, within the city or county for which he is appointed. The inspector shall in all cases take the oil or fluid from the package which is intended to be branded, and in no case shall mark or brand any package before having first inspected or tested the contents thereof; and the quantity used for testing the flash test thereof shall not be less than half a pint, and shall be ascertained by applying thereto a well-lighted match; and all such illuminating oils or fluids that will flash at a less temperature than 120 degrees Fahrenheit is to be branded "Rejected," and all that will stand the flash test of 120 degrees Fahrenheit he shall brand, "Approved Standard Oil." And while the inspector is in the discharge of his duties, if any dealer in or manufacturers of oils or fluids specified in Section 1 of this act, who shall refuse to

admit an inspector or his deputy upon his premises, so far as it may be necessary for the performance of his duties, or if he shall obstruct an inspector or his deputy in the discharge of his duties he shall, for each refusal to admit on his premises or obstruction offered to inspection, be fined for each offense not less than twenty dollars, nor exceeding fifty dollars.

Section 3. Be it further enacted, That the inspector shall, in addition to the brand provided in Section 2, affix his brand or device upon each package by him inspected, designating, first, his name and place and date of inspection, thus: "Inspector of ....., 18....;" second, the flash test, thus: "Flashed at ..... degrees temperature;" third, if the fluid inspected has no flash test, then the specific gravity of same, thus: "Specific gravity, ... degrees;" fourth, the capacity of the package in gallons and outs, thus: "Gallons, ...; outs, ..." Provided, that if hereafter weights shall be established for the ascertaining of the quantity, in place of gauging by gallons, then the inspector shall mark on the package inspected by him the gross weight in place of gallons, as provided for in this section. The inspector shall, in addition to the aforesaid, affix his brand on all packages by him found to contain fluids that have no flash test as aforesaid, with these words, "Highly inflammable."

Sec. 4. Be it further enacted, That if any person, manufacturer or dealer shall sell to any person whatever in the State any of said illuminating oils and fluids before first having the same inspected, as provided in this act, he shall be guilty of a misdemeanor, and on conviction be fined in any sum not exceeding three hundred dollars, and the oils and fluids, if found to be rejected, be forfeited and

sold, and the proceeds to go to the common school fund of the State. If any manufacturer or dealer of said illuminating oils or fluids shall, with intent to deceive or defraud, alter or erase the inspector's brand, to indicate a different flash test, gravity or quantity than is found by the inspector, or shall use with such intent packages having any inspector's brand thereon, without having the contents actually inspected, shall, on conviction, be fined in any sum not exceeding fifty dollars for every such offense.

Sec. 5. Be it further enacted, That all prosecutions for fines and penalties under provisions of this act, shall be by indictment in any court of competent jurisdiction, and when collected shall be paid into the treasury of the county where the offense is committed, one-fourth of which shall be paid to the informer, and three-fourths to the common school fund.

Sec. 6. Be it further enacted, That the inspectors are hereby empowered, if necessary to the convenient dispatch of their respective duties, to appoint competent deputies, for whom they shall be, and are hereby, made respectively responsible and accountable, which deputies are hereby empowered to perform the duties of inspector, and shall be liable, and are hereby made liable to the same penalties as the inspector.

Sec. 7. Be it further enacted, That no inspector or deputy inspector shall, while in office, be interested, directly or indirectly, in the manufacture or vending of any of the said illuminating oils or fluids to be inspected under this act; nor shall he for the purpose of inspection take away or appropriate any part of said illuminating oils or fluids to his own use, or for the use of any other person,

under a penalty of five hundred dollars to be recovered by indictment in the manner provided for in Section 5 of this act.

Sec. 8. Be it further enacted, That the term of office for said inspectors shall be for two years, or until removed by the Governor, and each shall demand and receive from the owner of the illuminating oils or fluids inspected and marked and branded as in this act provided, twenty-five cents for each barrel, and ten cents for each smaller package.

Sec. 9. Be it further enacted, That all oils and fluids, the product of coal, petroleum or other bituminous substances, which may be used for illuminating purposes, sent from other States to counties in this State without inspectors of oils and fluids, or sent from counties in this State without the barrels and packages containing the same being branded by law by the inspectors of the county or city from which they were sent, may be inspected in transitu, in the hands of the carrier, forwarding agent or warehouseman, and the inspector shall demand and receive for a single barrel sent to one party forty cents; for more than one barrel up to five barrels, thirty cents a barrel, and from five barrels to any number, twenty-five cents.

Sec. 10. Be it further enacted, That when oils specified in Section 9 of this act are sent from other States for consumption in this State for illuminating purposes to counties in this State, without an inspector, and the oils are inspected in transitu, and condemned as of less flash test than 120 degrees Fahrenheit, the inspector is authorized and directed to ship back said oils to the shippers of the oil. And when fluids specified in Section 9 of this act are sent into this State to counties or cities in this State

without an inspector, and the fluids are inspected in transitu, and found to be without a flash test, or to burn without being heated, the inspector shall brand the barrel or package containing the fluid "Unsafe for illuminating purposes." And all packages or barrels containing the fluids which are plainly marked by the manufacturers or shippers, "Naphtha," "Benzine," "Gasoline," together with the specific gravity of the fluids, may be permitted to go forward to their destination as not intended for illuminating purposes; but all barrels or packages of fluids without a flash test, and which are not branded or plainly marked as aforesaid, by the manufacturers or shippers, shall be considered as intended for illuminating purposes, and shall be shipped back in like manner as condemned oil, and the inspector shall notify the shipper of the cause and his action in the premises, and may collect the fees for oils and fluids inspected in the hands of the carrier, forwarding agent or warehouseman from the carrier, forwarding agent or warehouseman, as charged on the oils or fluids, and the carrier, forwarding agent or warehouseman may collect their fees as charges on the oils and fluids, and hold the oils and fluids until paid.

Sec. 11. Be it further enacted, That any inspector of this State, or his assistant, may go to any county in this State without an inspector when he has information that oils or fluids aforesaid of less flash test than 120 degrees Fahrenheit are being sold for illuminating purposes without the barrels and packages containing the same being branded as provided by law, and inspect and brand all the oils and fluids not branded by an inspector of this State, and shall demand and receive 30 cents a barrel for all barrels of oils and fluids aforesaid inspected by him, and the fees to be paid by the owner or the person for the time be-

ing in the possession of the oil, on the demand of the inspector.

Sec. 12. Be it further enacted, That if any carrier, forwarding agent or warehouseman shall refuse to pay the inspection fees as provided in this act, he shall be guilty of a misdemeanor, and on conviction before a competent tribunal of the refusal to pay the fees, he shall be fined $10 for each refusal, the fine to go to the school fund of the State.

Sec. 13. Be it further enacted, That all inspection fees accruing under this act are charged for the purpose of defraying the expenses connected with the inspection herein provided for, and to this end each of the several inspectors shall turn the same into the office of the State Treasury on the first Monday of March, June, September and December of each year.

Sec. 14. Be it further enacted, That each inspector shall make to the Comptroller of the Treasury, under oath, an itemized statement on each of said dates showing all the fees accrued and collected by him under this act during the quarter just past, which statement shall show the number of vessels, barrels and smaller packages inspected, and when and where and the names and residences of the persons, firms and corporations for whom inspected and gauged, and shall for this purpose keep a record showing same, and which shall be open to the inspection of all persons interested, and to all revenue agents and officers of the State.

Sec. 15. Be it further enacted, That the State Treasurer shall, on the first Monday of each of said months, pay to each inspector in cities of 60,000 population or over three hundred ($300) dollars; in cities of 20,000 popula-

tion or over and under 60,000, two hundred ($200) dollars; in cities of 8,000 population or over and under 20,000, one hundred ($100) dollars; in cities or towns of 2,000 population or over and under 8,000, fifty ($50) dollars; and in cities or towns of 1,000 to 2,000 population, and each county of over 1,000 population, but having no city or town of 1,000 population or over, twenty-five ($25) dollars; said population to be computed according to last or any succeeding Federal census; provided, that no inspector shall receive more than he collects in fees for any one year's service, nor more for any quarter than he collects for such quarter, unless to make good a deficit for some preceding quarter. The State Treasurer shall also, out of said fees, furnish each inspector with the necessary instruments or apparatus for testing, gauging and weighing said oils, fluids, liquors, molasses, etc., but no inspector shall be furnished said instruments by said Treasurer unless he collects fees in excess of his compensation allowed hereunder sufficient to pay for the same, and said Treasurer shall also, out of said fees, defray any and all expenses for paper, printing, postage, attorneys' fees, record books for inspectors and otherwise as may accrue hereunder.

Sec. 16. Be it further enacted, That the State Treasurer shall keep a separate account of all receipts arising hereunder, and shall report the same to the Governor at each meeting of the Legislature, together with the report of all the work done under this act.

Sec. 17. Be it further enacted, That before entering upon the discharge of his duties, each inspector aforesaid shall enter into bond payable to the State of Tennessee, conditioned for the proper disposition of the fees collected by him as herein provided, and for the faithful perform-

ance of his duties under this act, and to account for all moneys received and collected by him as such inspector; and for inspectors in counties of 40,000 population and under, according to the Federal census last preceding the making of the bond, the penalty of the same shall be two thousand dollars; and in counties of over 40,000 population, according to said census, the penalty of the bond shall be five thousand dollars. The bond of each inspector in each county shall be approved by and filed with the County Court Clerk of that county, and shall also provide in case of suit thereon for a reasonable attorney's fee for the State's attorney.

Sec. 18. Be it further enacted, That on failure of any inspector to turn over and account for the fees as herein directed within ten days after the time herein fixed, or for any other act or omission deemed sufficient by the Governor, he shall have the right to remove such inspector from office, and to appoint in his place another.

Sec. 19. Be it further enacted, That all acts and parts of acts in conflict with this act be, and they are hereby, repealed, and that this act take effect from and after the first day of July, 1899, the public welfare so requiring.

Passed April 11, 1899.

JOSEPH W. BYRNS,
Speaker of the House of Representatives.

SEID WADDELL,
Speaker of the Senate.

Approved April 21, 1899.

BENTON McMILLIN, Governor.

Office Supreme Court, U. S.
FILED.
JAN 7 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

NO. 128.

GENERAL OIL COMPANY,
Plaintiff in Error,

vs.

JOHN H. CRAIN, State Inspector of Oils, Etc.,
Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

CHARLES T. CATES, JR.,
Attorney General of Tennessee.

Foster, Webb & Parkes, Printers.

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REPLY BRIEF FOR DEFENDANT IN ERROR.

May It Please Your Honors:

Before replying to the contention of plaintiff in error that certain of its oils are not subject to inspection by the State of Tennessee, we respectfully challenge the jurisdiction of this court to determine the merits of the controversy, because—

No Federal question is involved,

in the decision of the Supreme Court of Tennessee (sought to be reviewed herein) dismissing the suit of plaintiff in error for want of jurisdiction in the courts of that State to entertain and determine said suit.

And in order that your Honors may better understand the question here presented **in limine**, we will briefly restate the case made by the pleadings on this point:

This suit was instituted in the Chancery Court of Shelby County by plaintiff in error, a Tennessee corporation, whose place of business is in the same county, by a bill in equity filed against John H. Crain, State Inspector of Oils for said county, for the purpose of enjoining him from inspecting certain of its oils and collecting the inspection fees thereon, upon the ground that such oils were not subject to inspection, either because they were not within the purview of the statute providing for the inspection of oils or for the reason that they were protected from inspection by the commerce clause of the Federal Constitution.

Among the grounds of demurrer interposed by the defendant the only one we need to notice is the **eighth** (Rec., p. 11), which challenged the jurisdiction of the State court to hear and determine the cause for the reason that it was in effect a suit against the State or against an officer of the State acting by the authority of the State with the view to reach the State, its treasury, funds or property.

This ground of demurrer was predicated upon a

statute of Tennessee, being the Act of 1873, Chapter 13—Shan. Code, Sec. 4507—as follows:

> "That no court in the State of Tennessee has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the State, or any officer acting by authority of the State, with a view to reach the State, its treasury, funds or property, and all such suits now pending or hereafter brought shall be dismissed as to the State or such officer, on motion, plea or demurrer of the law officer of the State or counsel employed by the State."

The **eighth** ground of demurrer was overruled by the Chancellor, but upon appeal to the Supreme Court of the State it was by that court held that the suit was in effect against the State and one of her officers acting by her authority within the meaning of the aforesaid Act of 1873, and that therefore the courts of the State were without jurisdiction to determine the questions involved therein. For this reason the State court refused to entertain and determine the suit (Rec., pp. 66-71, 72). It is proper to note here that the opinion of the Supreme Court of Tennessee is a part of the record of that court and will be read into its decree. (Shan. Code, Sec. 5736; Polk v. Pledge, 5 Heisk., 373-4). The opinion is officially reported under the style of the General Oil Company v. John H. Crain, 117 Tenn., 82.

An examination of the opinion and decree of the Supreme Court of Tennessee shows conclusively that no matter sought to be litigated by the plaintiff in error was determined—the court simply held that, under the laws of Tennessee, it had no jurisdiction to entertain the suit for any purpose. Therefore we respectfully insist that this holding involved no Federal question, but only the powers and jurisdiction of the courts of the State of Tennessee, in respect of which the Supreme Court of Tennessee is the final arbiter.

It is well settled that the construction of a State statute by the court of last resort of the State will be followed by this court, and therefore we respectfully submit that the construction placed by the Supreme Court of the State of Tennessee upon the Act of 1873 and its application to the suit of plaintiff in error is conclusive upon this court.

Noble v. Ga., 168 U. S., 398.
Aberdeen Bank v. Chehalee County, 166 U. S., 440.
N. Y., Etc., R. R. Co. v. Pennsylvania, 158 U. S. 431.
Sioux City, Etc., Co. v. Trust Co., 173 U. S., 99.
Clark v. Clark, 178 U. S., 186.
Mo., Etc., Ry. Co. v. McCann, 174 U. S. 580.

In the case of **Chambers v. Baltimore & Ohio R. R. Co.,** (decided November 18, 1907) this court speaking through Mr. Justice Moody, said:

> "But, subject to the jurisdiction of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them.

Surely it will not be contended that the Act of 1873 is in conflict with any provision of the Federal Constitution, or that the power of the State to regulate the administration of her internal affairs, by the creation of courts and prescribing their jurisdiction, is restricted in any way by the Federal Constitution.

In the case of **Freeport Water Co. v. Freeport City, 180 U. S., 587, 601**, it was in effect held by this court that the question as to what functions and jurisdiction a State court may have is a matter of State law—not of Federal concern—in respect of which the decision of the State courts will be followed by this court.

Further, it has been held that questions of practice and proceedings in the State courts are for the exclusive determination of the tribunals of the State where they may arise.

Railroad Co. v. Hopkins. 94 U. S., 11.
Trip v. Santa Rosa, Etc., 144 U. S., 130.
Oxley Stave Co. v. Butler County, 166 U. S., 648.

In **Loeber v. Schroeder, 149 U. S., 580-5,** this court said:

> "The provisions of the statute complained of by plaintiff in error are manifestly not in conflict with any

provision of the Constitution of the United States or of any law of Congress passed in pursuance thereof. The State statute relates to a matter of State practice and a proper construction of that statute upon well settled principles rested with the State courts. The question as to whether the plaintiff's remedy was at law or in equity was a matter depending entirely upon local law and involved no Federal right whatsoever."

In **Semple v. Hager, 4 Wall., 431-425,** this court declined to review—on the ground that it had no jurisdiction—the judgment of a State court which refused to take jurisdiction of a case.

In **Norton v. Shelby County, 118 U. S., 425,** this court held that the decision of the Supreme Court of Tennessee as to the existence of her subordinate courts and tribunals is conclusive upon this court. Would this not also apply to the holding of the Supreme Court of Tennessee as to the jurisdiction of her courts?

In **Smith v. Nelsit, 16 Wall., 185, 190,** this court in effect held that whether the State court had jurisdiction of a particular case is a question exclusively for the determination of the State court.

In **Callen v. Bransford, 139 U. S., 198,** a writ of error was dismissed by this court because the State Supreme Court had refused to take jurisdiction of the case—the amount being below the amount required by the State Constitution to give the court jurisdiction.

In **Newman v. Gates, 204 U. S. 89, 95,** it was in effect held that the jurisdiction of this court to review the judgment or decree of a State court where a Federal question is presented is limited to the review of the final judgment or decree actually or constructively deciding such question when rendered by the highest court of the State in which a decision of the suit could be had, and when, as for want of a proper appeal, no final decree could be rendered, it results that the statutory prerequisite for the exercise of the reviewing power is wanting.

Therefore, we submit that the decision of the Supreme Court of Tennessee, defining and limiting its own jurisdiction, involved no Federal question and this court is without jurisdiction to inquire into the merits of the controversy.

Further, we respectfully submit the many decisions cited in the brief of counsel for plaintiff in error (Rec., pp. 19-32) are not in point for the reason that they pertain to the jurisdiction of the Federal courts of cases against States or State officials, and therefore they are clearly distinguishable from the case at bar. Some of the cases cited by learned counsel for plaintiff in error sustain the position we contend for, but we do not deem it necessary to review those cases, for the reason stated.

While we do not deem it necessary in order to sustain our position, nevertheless it is not improper to call your Honors' attention to the history of the Act of 1873 as set out in our brief filed in the court below (Rec., pp. 57, 60) and as shown in the opinion of the Supreme Court of Tennessee. (Rec., pp. 68-71.)

If our contention here made be sustained, it by no means follows that plaintiff in error, if it is being wronged by the authorities of Tennessee, is without remedy, because, in any suit brought against plaintiff in error to enforce the penalties prescribed by the Tennessee inspection statute, it would be entitled to plead and to set up whatever defense it may have under the laws either of the State or of the United States.

And now, inasmuch as the Supreme Court of Tennessee did not decide the merits of the questions insisted upon by plaintiff in error either for or against it, we are doubtful as to how we should proceed in any discussion of such questions; however, if the decision of the State court is to be considered by this court as adverse to plaintiff in error, we respectfully insist that the questions which plaintiff in error seeks to have determined in its favor are without merit.

I.

AS TO INTERSTATE COMMERCE.

As above stated, it is insisted that certain of the oils belonging to plaintiff in error and stored in Memphis are protected from inspection by the commerce clause of the Federal Constitution upon the ground that said oils are engaged in and a part of the interstate business or commerce carried on by plaintiff in error.

The averments of the bill do not sustain the contention made by plaintiff in error. It is to be borne in mind that plaintiff in error is a Tennessee corporation, having its principal place of business at Memphis, where it is engaged in selling and offering for sale illuminating oils to citizens of Tennessee, Arkansas, Mississippi and Louisiana. All sales of oil made by plaintiff in error are, in so far as the bill shows, made at its place of business in Memphis. Plaintiff in error claims that in the States of Ohio and Pennsylvania are located its wells and refining and manufacturing plants, from which it procures the oil sold by it in its business at Memphis—the oil being transported to Memphis in tank cars holding from five thousand to eight thousand gallons each.

Until about the time the bill was filed, plaintiff in

error had without question permitted its oils stored in Memphis to be inspected under the provisions of the statute attacked in this cause, and had paid all inspection fees due thereon (Rec., p. 3), but, conceiving that its oil sold or intended to be sold to citizens of other States was not subject to inspection, it proceeded to erect two large tanks, one of which it marked or labeled, "Oil already sold in Arkansas, Louisiana and Mississippi," and the other it labeled or marked, "Oil to be sold in Arkansas, Louisiana and Mississippi," and these receptacles or tanks it filled from the tank cars in which the oil was transported from Ohio or Pennsylvania to Memphis.

There is no pretense made that the oil had been separated or divided before it reached Memphis, or that any part of it had been separated from the general mass so as to identify it as the property of the persons with whom plaintiff in error claimed to have contracts.

From these tanks plaintiff in error filled its orders, drawing the oil into smaller receptacles or barrels, and delivering the same to a common carrier to be transported to the purchaser.

From these facts, it is manifest that the oil belonged to plaintiff in error, even after it had been separated from the bulk of oil in the larger tanks and

drawn into barrels or smaller receptacles, and until its actual delivery to a common carrier to be transported to the purchaser. Before such delivery if the oil should be destroyed, the loss would unquestionably fall upon plaintiff in error.

There is no claim made in the bill that the oil is sold elsewhere than at the place of business of plaintiff in error in Memphis. It is true that plaintiff in error brings all of the oil sold by it at its place of business in Memphis from its refineries in other States, but we submit that, when this oil has reached Memphis and is there stored and at rest as a part of the general mass of property in the State, it becomes subject to inspection by the Tennessee authorities.

American Steel & Wire Co. v. Speed, 192 U. S., 500.

In its bill, plaintiff in error contends that the Tennessee inspection statute does not apply to oil intended for sale and sold to citizens of other States, but in the case of Coffin v. State, 2 Lea, 559, the Supreme Court of Tennessee held that the inspection act of 1877, which in substance is the same as the act of 1899, applied to all coal oil and other illuminating fluids manufactured or offered for sale in Tennessee, whether sold for consumption in Tennessee or elsewhere.

But it is insisted by the learned counsel for plaintiff in error that the purpose of a State inspection law is to protect the citizens of that State, and that Tennessee is not concerned in protecting the inhabitants of Arkansas, Louisiana and Mississippi, and therefore has no right to inspect oils sold or intended to be sold to citizens of said States, although the oil was stored and at rest at defendant's place of business in Memphis.

We submit that the learned counsel for plaintiff in error is altogether mistaken in his contention that State inspection laws are solely for the benefit of the inhabitants of a State, and to insure them the safe quality of the particular commodity inspected. The object of inspection laws is not only to protect the community, so far as they apply to domestic sales, from frauds and impositions, but in relation to articles designed for exportation, to preserve the character and reputation of the State in foreign markets.

Chutsman v. Northrop, 8 Cowen, 46.

Patapsco Guano Co. v. Board of Agriculture, 171 U. S., 356.

Is there any reason why Tennessee should see to it that oils set apart in tanks Nos. 1 and 2 should be inspected?

Plaintiff in error is a Tennessee corporation; its place of business is in Tennessee; its oils are collected

there before being shipped into other localities; and it is immaterial that the oil shipped by complainant into other States is not a product of Tennessee, because it is manifest that such oil sold by a Tennessee corporation and shipped from its place of business in Tennessee will be regarded as Tennessee oil, and if it be of dangerous or unfit quality, the reputation of the State will necessarily suffer, if such oil is permitted to be sold and shipped into other States.

No State should permit its territory to be used as a place where unfit, highly inflammable and dangerous substances, such as the oils in question, are collected for the purpose of being sold and sent into the surrounding States without full and adequate inspection. By the act in question Tennessee has endeavored to safeguard against such conditions, and from the action of plaintiff in error in this case it is manifest that it does not care so much for the fees charged as it resents, and desires to prevent, the inspection of its oils. It agreed to pay into court the amount of the inspection fees, but not after inspection, which it would not permit. (Rec., p. 12.)

Further, it is to be borne in mind that the marketing and branding of the barrels and packages, as provided in section 3 of the act, is as much a part of the inspection required as the determination of the quality

of the oil contained in such barrels and packages, and these are among the recognized elements of inspection laws as defined by this court in Turner v. Maryland, 107 U. S., 38.

The right to make and enforce inspection laws was not granted to the Federal government, but was reserved to the States (Neilson v. Garza, 2 Woods, 287; Patapsco Guano Co. v. Board of Agriculture, 171 U. S, 356); and surely it cannot be seriously contended that oil, the product of a State other than Tennessee, is immune from inspection in that State in the possession of the owner because it is intended for sale or has been sold to a citizen or citizens of other States. If such insistence could be maintained, it is not difficult to understand how helpless would be the authorities of a State to protect its citizens from the presence of noxious or dangerous materials, when a dealer therein could collect them from other States upon the pretext, or for the purpose, of selling them from his place of business in the State to citizens of other States.

We regard the arrangement of the two tanks marked in the manner stated as a thinly disguised device to evade the law, but, as said by this court, "indirect schemes to evade State laws do not meet with favor in the courts."

Mitchell v. Leavenworth County, 91 U. S., 206.

The case of **Patterson v. Kentucky, 97 U. S., 501,** sustained as a valid exercise of the police power the Kentucky Inspection Act of 1874, which provided that oils used for illuminating purposes, by whatever name called or wherever manufactured, shall be inspected before being sold or offered for sale. The provisions of the Kentucky statute are very similar to those of the statute under consideration in this case, and this court, upon the question of the power of the State to enact such laws, among other things, said:

> "'In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left within the individual states and cannot be assumed by the national government.' Cooley's Const. Lim., p. 570. . . . . By the settled doctrines of this court, the police power extends, at least, to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily intrench upon any authority which has been confided, expressly or by necessary implication, to the national government. The Kentucky statute under consideration manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the state that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes.

> Whether the policy thus pursued by the state is wise or unwise, it is not the province of the national authorities to determine. That belongs to each state, under its own sense of duty, and in view of the provisions of its own constitution. Its action, in those respects, is beyond the corrective power of this court."

Moreover, all inspection laws may have a remote and in some cases a considerable influence on commerce, as is recognized in the case above cited, but it is not every statute passed under the police power of the State that is void because it in some way affects commerce between the States. This court has repeatedly held that many agencies employed in interstate commerce are subject to the proper police power of the State. It has been held that a statute prohibiting the running of trains within the State on Sunday is not void as interfering with interstate commerce, though in effect it prevents trains from passing through the State on Sunday from and to adjacent States, but is a valid exercise of the police power.

Hennington v. Georgia, 163 U. S., 299.

So a statute requiring railroads engaged in interstate and other commerce to stop their trains each way daily, Sundays excepted, has been upheld as a reasonable and valid police regulation.

Lake Shore, etc., Ry. Co. v. Ohio, 173 U. S., 285.

So a State may require engineers and other persons

engaged in the driving and management of railroad trains passing through the State to submit to an examination by a local board as to their fitness for their positions.

Smith v. Alabama, 124 U. S., 465;
Richmond, etc., R. R. Co. v. Patterson, 169 U. S. 311;
Mo., etc., R. R. Co. v. Haber, 169 U. S., 633;
Nashville, etc., R. R. Co. v. Alabama, 128 U. S., 96.

So a State may require, under penalties, the heating of passenger cars engaged in interstate commerce.

New York, etc., R. R. Co. v. N. Y., 165 U. S., 628.

A regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce.

Erb v. Morasch, 177 U. S., 584.

So it is entirely within the power of a state to provide separate coaches for the accommodation of the white and colored races.

L. N. O. & T. P. R. R. v. Miss., 133 U. S., 589.
Plessy v. Ferguson, 163 U. S., 537.
Smith v. State, 100 Tenn., 494.

In **Pittsburgh, etc., Coal Co. v. La., 156 U. S. 590, 600.** it was held that a state had power to provide for the appointment of one or more gaugers of coal and coke boats, transporting coal from Pittsburgh over the waters of the Mississippi River to New Orleans and that such regulation was not in conflict with the commerce clause of the Federal Constitution.

In this last case Mr. Justice Field quoted with approval **Sherlock v. Alling, 93 U. S., 99,** as follows:

> "But, upon examination of the cases, * * * it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce or exacted a license from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all cases the legislation attempted operated **directly** upon commerce, either by way of a tax upon business, license for its pursuit in particular channels, or conditions for carrying it on. * * * In conferring upon Congress the regulation of commerce, it was never intended to cut the State off from legislating on all subjects relating to the health, life and safety of her citizens, though the legislation might **indirectly** affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce, and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution. * * * **And it may be said generally, that legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."**

Therefore, we respectfully insist that plaintiff in error, a citizen of the State of Tennessee, owing its

very existence to the laws of Tennessee and dependent upon such laws for the protection of its property, will not be permitted to carry on its business in Tennessee without full compliance with those proper and necessary police regulations which the lawmakers of Tennessee have seen fit to enact.

II.

THE AMOUNT OF THE INSPECTION FEES DO NOT RENDER THE ACT VOID.

The fees provided by the act of 1899 are intended solely to cover the cost of inspection, and it is provided that all the expenses incident to inspection, including the cost of appliances to be furnished inspectors, all of his expenses, record books and attorneys' fees, as well as the compensation of the inspector, shall be paid from the funds derived from inspection.

Acts of 1899, Ch. 349, Secs. 13 15.

Moreover, upon the question of the effect of fees alleged to be excessive, this court, in the case of McLean v. Railroad Co., 203 U. S., 38-55, said:

> "It is further urged that this law is invalid because it imposes an unreasonable fee for the inspection which goes into the treasury of the sanitary board, and the allegations of the writ tend to show that an inspector might make a considerable sum in excess of day's wages

in the work of inspecting hides under the provisions of this act. The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the Legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law. Patapsco Guano Co. v. North Carolina, 171 U. S., 345."

Further, in **McLean v. Railroad, supra,** upon the question of the power of the State to enact valid police regulations, although the same may have some effect upon interstate Commerce, this Court said:

"It will only be necessary to refer to a few of the many cases decided in this court holding valid enactments of Legislatures having for their object the protection, welfare and safety of the people, although such laws may have an effect upon interstate commerce. M. K. & T. R. R. Co. v. Haber, 169 U. S., 613, 635; Chicago, Milwaukee & St. Paul R. R. Co. v. Sloan, 169 U. S., 133; Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477. The principle decided in these cases is that a State or territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the Legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce. In Patapsco Guano Co. v North Carolina Board of Agriculture, 171 U. S., 345, it was directly recognized that the State might pass inspection

laws for the protection of its people against fraudulent practices and for the suppression of frauds, although such legislation had an effect upon interstate commerce. The same principle was recognized in Neilson v. Garza, 2 Woods, 287, a case decided by Mr. Justice Bradley on the circuit, and quoted from at length with approval by Mr. Chief Justice Fuller in the Patapsco case."

III.

PLAINTIFF IN ERROR IS NOT ENTITLED TO AN INJUNCTION.

An examination of the act of 1899 shows that the inspector of oils is without power to distrain for any penalty imposed upon a violator of the provisions of the act. When plaintiff in error refused permission to the inspector to come upon its premises and inspect its oils, it was guilty of a misdemeanor punishable under the general criminal laws of the State, but the inspector had no power to put in operation such laws, but the execution thereof is entrusted to other officials, to wit: the District Attorneys General.

So that, plaintiff in error invokes the intervention of a court of equity to protect it from a penalty which it has incurred under the statute, but not from any act of the inspector of oils, which, under the statute, would be a lien or charge upon the property of plaintiff in error, or for which the inspector could bring an

action at law against plaintiff in error. In other words, plaintiff in error seeks protection from its own acts which, upon the face of the statute, are declared to be misdemeanors.

Further, we may be pardoned for looking upon the bill filed by plaintiff in error as an attempt to take the opinion of the court upon the question as to how far it may resist the inspection of its oils, and at the same time escape the penal consequences of its acts. Plaintiff in error, in order to avoid the inspection of its oils which it was accumulating upon Tennessee soil for the purpose of being sold and shipped into other States, devised a scheme of erecting two tanks from which the oil to be transported into other States is drawn, barreled and shipped to the purchaser. Then, as it avers in its bill (Rec., p. 3), having paid all of the inspection fees upon all of its oil shipped into Tennessee, whether for sale in this State or other States "up to the present time"—that is, to the filing of the bill—it proceeds to file its bills, fill these tanks Nos. 1 and 2, then say to the State Inspector: "You shall not inspect the oils contained in these tanks—I am devoting them to purposes of interstate commerce."

This it was permitted to do under the preliminary injunction granted by the Chancellor. So that, for more than two years, it has been sending from its place

of business in Shelby County into other States large quantities of oil, without an inspection as to their quality or a brand thereon, as required by the act of 1899.

Therefore, in our opinion, the contention of plaintiff in error is without merit.

Respectfully submitted,

CHARLES T. CATES, JR.,

Attorney General of Tennessee.

GENERAL OIL COMPANY *v.* CRAIN, INSPECTOR OF COAL OIL.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 128. Argued January 23, 1908.—Decided March 23, 1908.

Where complainant is entitled to equitable relief against the enforcement by state officers of an unconstitutional state statute, the judgment of the state court dismissing the bill for lack of jurisdiction on the ground that the suit is one against the State gives effect to the statute, denies complainant a constitutional right and is reviewable by this court under § 709, Rev. Stat.

A suit against state officers to enjoin them from enforcing a state statute which violates complainant's constitutional rights either by its terms or by

the manner of its enforcement is not a suit against the State within the meaning of the statute of 1873 of Tennessee, denying jurisdiction to the courts of the State, of suits against the State.

Provisions of the Federal Constitution and of the Fourteenth Amendment cannot be nullified by the State prohibiting suits in its own courts against state officers to prevent their enforcing unconstitutional statutes and contending that the National tribunals are also precluded from entertaining such suits under the Eleventh Amendment.

Merchandise may cease to be interstate commerce at an intermediate point between the place of shipment and ultimate destination; and if kept at such point for the use and profit of the owners and under the protection of the laws of the State it becomes subject to the taxing and police power of the State. The act of 1899 of Tennessee providing for the inspection of oil is not an unconstitutional burden on interstate commerce as applied to oil coming from other States and ultimately intended for sale and distribution in other States but meanwhile stored in Tennessee for convenience of distribution and for reshipping from tank cars and barreling.

95 S. W. Rep. 824, affirmed.

PLAINTIFF in error, which was also plaintiff in the courts below, invokes the protection of the commerce clause of the Constitution of the United States against the collection of a tax for the inspection of certain of its oils in Tennessee. The bill prayed an injunction against the defendant, based on the following facts summarized from the bill:

The plaintiff is a Tennessee corporation with its principal place of business in Memphis, Tennessee. It is engaged in the manufacture and sale of coal oil and other illuminating oils in the various States of the Union. Its wells and refining and manufacturing plants are all located in the States of Pennsylvania and Ohio, from which it ships its products to the States in which they are sold and used. On account of the tendency of the oils to leak and evaporate, and, under change of temperature, to burst the vessel in which they are contained, it is necessary to ship the oils in tank cars, and it is also necessary to have distributing points for such oils in various places in the United States at which it may receive the oils so shipped and place it in barrels or other similar vessels suitable in size for filling orders, which vary in amounts from one barrel upward. It would be impracticable to carry on business in or to have apparatus and

machinery for the reception and delivery of oil at every point at which plaintiff ships oil. For some years plaintiff has been engaged in business at Memphis, and has made that city not only a place of business at which to sell oil to the citizens and residents of Tennessee, but also has made it one of its distributing points to which its oils are shipped from Pennsylvania and Ohio in tank cars, from which cars the oils are unloaded into various tanks, barrels and other receptacles for the purpose of being forwarded to its customers in Arkansas, Louisiana and Mississippi, in which States it has many regular customers from whom it always has on hand many unfilled orders for oil to be delivered as soon as possible or convenient.

At Memphis plaintiff has numerous tanks or receptacles for oil of various kinds and sizes, among which are the following: (1) A tank or vessel in which is kept oil for which orders have been received from the States above mentioned before its shipment from the manufacturing plants and which are especially shipped to fill such orders. This oil is unloaded at Memphis only for the purpose of distribution in smaller vessels to meet the requirements of such orders, and is kept separate from oils for sale in Tennessee, in a tank plainly and conspicuously marked "Oil already sold in Arkansas, Louisiana and Mississippi," and remains in Tennessee only long enough (a few days) to be properly distributed according to the orders therefor. (2) Another tank or vessel for oil to be sold in those States, but for which no orders at the time of shipment from the manufacturing plants. This tank is marked "Oil to be sold in Arkansas, Louisiana and Mississippi," and is kept separate and apart from all other oil until required to supply orders to plaintiff's customers in those States, and is never sold except upon the receipt of such orders.

The defendant, as inspector of oils, from time to time inspects plaintiff's oils at Memphis and charges and collects for such inspection a regular fee of twenty-five cents per barrel, as provided in § 8 of the act of April 21, 1899, of the legislature of Tennessee, c. 349, pp. 811, 814, and the plaintiff has fully

paid such charges up to the present time on all of its oils shipped into Tennessee, whether intended for sale in that State or other States. Until recently plaintiff has unloaded the greater portion of its oil from its tank cars to its stationary tanks without attempting to separate the oil sold or intended to be sold in the States above mentioned from that to be sold in the State of Tennessee, and paid the inspection charges upon all. Plaintiff, however, is now separating its oil in the manner above described, because it has been advised that the oil intended to be sold outside of Tennessee is not subject to inspection in that State if kept separate from the oil sold or intended to be sold in that State.

Defendant claims the right to inspect such oils, although he knows and admits no sales thereof are made in Tennessee, and claims that he is not only entitled but that it is his duty to inspect the same and collect the regular fees for such inspection.

Plaintiff is advised and shows that defendant has no right to inspect the oil or collect the fees, because the act of 1899 does not apply to them, for reasons which are elaborately set out, but it is alleged that if the act should be construed to apply to them the act is unconstitutional, "in so far as it provides for or requires an inspection of any of the oil in said tanks, because such inspection would be a regulation of and interference with commerce between the States of Pennsylvania and Ohio, from which said oil was shipped, and the States of Arkansas, Louisiana and Mississippi, to which the same was shipped, in violation of the Constitution and laws of the United States, and especially of the third clause of § 8 of Article I of the Constitution of the United States, which provides that Congress shall have power 'To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.' "

Plaintiff alleges that the act of 1899 and the inspection thereunder is not a valid exercise of the police power of the State, and to that extent the act is unconstitutional and void, because (1) none of the oil is manufactured in Tennessee and the inspection, therefore, is not necessary for the protection either of

the residents and citizens of Tennessee or the reputation of her manufactured products. (2) The fees are unreasonable and exorbitant for the service performed and very much greater than necessary to provide for inspection, and that after payment of the salaries and other expenses incident to inspection there is a surplus of many thousands of dollars put into the treasury annually. (3) The act is void under the constitution of the State of Tennessee, because the inspection is not necessary or conducive to the benefit of the State of Tennessee or the citizens thereof, and the act is therefore unnecessary, unreasonable and not a valid exercise of the police power of the State, but a mere tax or charge imposed under the guise of a police regulation, and as such is in conflict with article II, § 28, of the constitution of Tennessee, which requires all property to be taxed according to its value and that taxes be equal and uniform throughout the State.

It is alleged that the act provides in § 2 a heavy penalty, consisting of a fine of from twenty to fifty dollars for each offense, against any dealer or manufacturer who shall obstruct the inspector in the discharge of his duties, or refuse to permit him upon his premises for the performance thereof; and provides in § 4 that it shall be a misdemeanor for any person to sell any oil before having it inspected as provided in the act, and on conviction shall be fined $300, and the oil, if found to be rejected, shall be forfeited and sold. Plaintiff therefore, it is alleged, on account of the severe penalties, could not afford to take the risk of selling any oil without inspection or take the risk of refusing permission to inspect. That it is doubtful if plaintiff, if it paid the fees under protest, could recover the same, and if they could be recovered it would be necessary for plaintiff to bring suit every thirty days for the charges paid for the preceding thirty days, so that an indefinite number of suits would be necessary. Irreparable injury will therefore result, it is alleged, if the inspection against plaintiff's oils under the act of 1899 be not enjoined.

Defendant filed a demurrer which attacked the bill for want

of equity, and also the jurisdiction of the court to hear and determine the cause, for the reason that it was a "suit against the State, or against an officer of the State, acting by authority of the State, with a view to reach the State, its treasury funds or property." By this ground of demurrer defendant attempted to avail himself of an act of the State of Tennessee, approved February 28, 1873, c. 13, p. 15, being § 4507 of Shannon's Code, which provides as follows: "That no court in the state of Tennessee has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the State, or any officer acting by the authority of the State, with a view to reach the State, its treasury, funds, or property, and all such suits now pending, or hereafter brought, shall be dismissed as to the State, or such officer, on motion, plea or demurrer of the law officer of the State, or counsel employed by the State."

The demurrer was overruled "as to that part of the bill in reference to the first tank mentioned in said bill." It was sustained "as to all that part of the bill in reference to the second tank mentioned in said bill." The ground of demurrer which went to the jurisdiction of the court was overruled "as to the oil in both tanks."

A preliminary injunction which had been granted was continued in force. Inspection, however, it was adjudged, might proceed, the fees to be paid into court pending appeal to the Supreme Court of the State.

An appeal was taken, and the Supreme Court decided that the suit was one against the State, and reversed the decree of the chancery court. 95 S. W. Rep. 824.

Mr. H. J. Livingston, Junior, with whom *Mr. Thomas B. Turley* was on the brief, for plaintiff in error:

The bill undoubtedly presents for determination Federal questions, as certain rights under the Constitution of the United States are asserted. It also further shows special conditions which prevent plaintiff in error from obtaining adequate protection in said constitutional rights except by injunction. This

being true, the mere refusal of the chancery court of Tennessee to take jurisdiction and grant this injunctive relief is a practical denial of the above constitutional rights, which may be reviewed by this court.

More especially is this true where the refusal of said state court to grant such relief is in obedience to or under color of an express state statute which is in itself in conflict with the Constitution of the United States. A state statute which closes the doors of the courts and prevents adequate protection against an illegal inspection of an article which is not subject to inspection under the Federal Constitution, itself amounts to an interference with interstate commerce, deprives plaintiff in error of its property without due process of law, and denies it the equal protection of the laws.

This is not a suit against the State of Tennessee. Actions against state officers to restrain them from the commission of wrongful acts to the prejudice of plaintiff's rights are not suits against the State. *Davis* v. *Gray*, 16 Wall. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 10; *Hans* v. *Louisiana*, 135 U. S. 1; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270; *United States* v. *Lee*, 106 U. S. 196; *Williams* v. *United States*, 138 U. S. 514; *Re Tyler*, 149 U. S. 164; *Cummings* v. *Merchants' National Bank*, 101 U. S. 153; *Dodge* v. *Woolsey*, 18 How. 331; *Reagan* v. *Farmers' Loan & T. Co.*, 154 U. S. 362; *Scott* v. *Donald*, 165 U. S. 107; *Belknap* v. *Schild*, 161 U. S. 107.

The oil in both of the tanks described in the bill is engaged in and a part of interstate commerce while in Tennessee.

The inspection thereof is an interference with interstate commerce, such as is contrary to the Constitution of the United States.

When goods start on their journey from State to State they become interstate commerce, and are protected from interference or regulation by any State through which they may pass until they reach their ultimate destination; notwithstanding on the way they may be delayed for a reasonable time on

account of inadequate means of transportation, or for reshipment, or assortment, or distribution, or on account of any accident, or any other cause which may intervene to prevent the goods going directly from the initial point of shipment to the point of destination. *Coe* v. *Errol*, 116 U. S. 517; *Kelley* v. *Rhoads*, 188 U. S. 1; *State* v. *Engle*, 5 Vroom (N. J.), 425; *State* v. *Carrigan*, 10 Vroom (N. J.), 35; *The Daniel Ball*, 10 Wall. 557; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17; *State* v. *Engle*, 5 Vroom (N. J.), 425.

In the case at bar it is conceded that none of the oil in said two tanks will finally remain in Tennessee; the question is whether said oil while in Tennessee is in transit or at rest. With this question the original package doctrine has nothing to do; the question involved is rather analogous to those involved in the following cases hereinbefore cited: *Coe* v. *Errol*, 116 U. S. 516; *Kelley* v. *Rhoads*, 188 U. S. 1; *State* v. *Engle*, 34 N. J. L. 425; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500.

In order to be valid, a so-called inspection law must be such in fact, and must be enacted for the purpose and must be calculated to accomplish the ends for which valid inspection laws may be enacted.

None of said oil is sold in Tennessee, and none of it is manufactured in Tennessee. Hence the inspection thereof is unnecessary to protect either the citizens of Tennessee or the reputation of her manufactured products abroad.

The fees provided by said act are unreasonable and exorbitant, and very much greater than necessary to provide for the expense of such inspection, so that the treasury of Tennessee annually receives a large surplus therefrom, which is diverted to other purposes.

The mere fact that a state statute is enacted in good faith as an exercise of the police power will not render it valid if it in fact amounts to a regulation of interstate commerce. 17 A. & E. Enc. Law, 75; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 465; *State Freight Tax Case*, 15 Wall. 232; *Leisy* v. *Hardin*, 135 U. S. 100; *Louisville &c. Ry. Co.* v. *Mississippi*, 133 U. S. 587;

Hall v. *DeCuir*, 95 U. S. 485; *Brennan* v. *Titusville*, 153 U. S. 289; *Missouri R. R. Co.* v. *Haber*, 169 U. S. 613; *Hannibal &c. Co.* v. *Husen*, 95 U. S. 473.

Mr. Charles T. Cates, Junior, Attorney General of the State of Tennessee, for defendant in error, submitted:

The holding that the court below had no jurisdiction, involved no Federal question, but only the powers and jurisdiction of the courts of the State of Tennessee, in respect of which the Supreme Court of Tennessee is the final arbiter.

The construction of a state statute by the court of last resort of the State will be followed by this court, and therefore the construction by the state court of the act of 1873 and its application is conclusive upon this court. *Noble* v. *Georgia*, 168 U. S. 398; *Aberdeen Bank* v. *Chehalee County*, 166 U. S. 440; *N. Y. &c. R. R. Co.* v. *Pennsylvania*, 158 U. S. 431; *Sioux City &c. Co.* v. *Trust Co.*, 173 U. S. 99; *Clark* v. *Clark*, 178 U. S. 186; *Mo. &c. Ry. Co.* v. *McCann*, 174 U. S. 580; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 601; *Railroad Co.* v. *Hopkins*, 94 U. S. 11; *Trip* v. *Santa Rosa &c.*, 144 U. S. 130; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *Loeber* v. *Schroeder*, 149 U. S. 580, 585.

The oil in question in this case was not protected from inspection by the commerce clause of the Federal Constitution.

There is no claim made in the bill that the oil is sold elsewhere than at the place of business of plaintiff in error in Memphis. It is true that plaintiff in error brings all of the oil sold by it at its place of business in Memphis from its refineries in other States, but when this oil has reached Memphis and is there stored and at rest as a part of the general mass of property in the State, it becomes subject to inspection by the Tennessee authorities. *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500.

The object of inspection laws is not only to protect the community, so far as they apply to domestic sales, from frauds and impositions, but in relation to articles designed for exportation, to preserve the character and reputation of the State in

foreign markets. *Chutsman* v. *Northrop*, 8 Cowen, 46; *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U. S. 356.

All inspection laws may have a remote and in some cases a considerable influence on commerce, as is recognized in the cases above cited, but it is not every statute passed under the police power of the State that is void because it in some way affects commerce between the States. Many agencies employed in interstate commerce are subject to the proper police power of the State. *Hennengton* v. *Georgia*, 163 U. S. 299; *Lake Shore Ry. Co.* v. *Ohio*, 173 U. S. 285; *N. Y. &c. R. R. Co.* v. *N. Y.*, 165 U. S. 628; *Erb* v. *Morasch*, 177 U. S. 584; *Smith* v. *Alabama*, 124 U. S. 465; *Richmond &c. R. R. Co.* v. *Patterson*, 169 U. S. 311; *Mo. &c. R. R. Co.* v. *Haber*, 169 U. S. 633; *Nashville &c. R. R. Co.* v. *Alabama*, 128 U. S. 96; *L., N. O. & T. P. R. R.* v. *Mississippi*, 133 U. S. 589; *Plessy* v. *Ferguson*, 163 U. S. 537; *Smith* v. *State*, 100 Tennessee, 494; *Pittsburg &c. Coal Co.* v. *Louisiana*, 156 U. S. 590, 600.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

It is contended by defendant in error that this court is without jurisdiction because no matter sought to be litigated by plaintiff in error was determined by the Supreme Court of Tennessee. The court simply held, it is said, that, under the laws of the State, it had no jurisdiction to entertain the suit for any purpose. And it is insisted "that this holding involved no Federal question, but only the powers and jurisdiction of the courts of the State of Tennessee, in respect to which the Supreme Court of Tennessee is the final arbiter."

Opposing these contentions, plaintiff in error urges that whether a suit is one against a State cannot depend upon the declaration of a statute, but depends upon the essential nature of the suit, and that the Supreme Court recognized that the statute "added nothing to the axiomatic principle that the State, as a sovereign, is not subject to suit save by its own

consent." And it is hence insisted that the court by dismissing the bill gave effect to the law which was attacked. It is further insisted that the bill undoubtedly presents rights under the Constitution of the United States and conditions which entitle plaintiff in error to an injunction for the protection of such rights, and that a statute of the State which operates to deny such rights, or such relief, "is itself in conflict with the Constitution of the United States."

Plaintiff in error to sustain its contention that the suit is not one against the State, but one to restrain "unconstitutional aggression" by a state officer upon private property, cites many cases in this court. To these cases defendant in error makes no other reply than to say that they were cases in the Federal courts and within the acknowledged range of the jurisdiction of courts, while the question presented by the motion to dismiss is not the rights plaintiff in error may have, but what remedies it has and the power of the State over those remedies so far as its own courts are concerned. This difference is urged as material, and the following cases are adduced: *Semple* v. *Hagar*, 4 Wall. 431; *Norton* v. *Shelby County*, 118 U. S. 425; *Smith* v. *Adsit*, 16 Wall. 185, 190; *Callen* v. *Bransford*, 139 U. S. 197; *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 601; *Newman* v. *Gates*, 204 U. S. 89, 95; *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142.

A review of these cases becomes necessary. In *Semple* v. *Hagar*, Semple had a patent from the United States for a certain tract of land. He sued Hagar to quiet his title, alleging that Hagar claimed the land under a fraudulent Mexican grant, and a patent of the United States issued in affirmance of the grant. Semple prayed that the grant be declared void "as issued upon false suggestion and without authority of law." Hagar demurred to the bill, on the ground, among others, that the court had no jurisdiction of the action. The demurrer was sustained and the case was brought to this court by writ of error. A motion to dismiss was made, which was granted. The court said: "We have here a very brief record, and, on the facts of

the case, we cannot shut our eyes to the total want of jurisdiction, under the twenty-fifth section, or any other section of the Judiciary Act. It is plain that if the court had assumed jurisdiction, and had declared the defendant's patent void, for the reason alleged in the bill, the defendant would have had a case which might have been reviewed by this court, under the twenty-fifth section, and one on which there might have been a question and difference of opinion. But it is hard to perceive how the twenty-fifth section could apply to a judgment of a state court, which did not decide that question, and refused to take jurisdiction of the case. The matter is too plain for argument." In other words, it was decided that the Federal question must be decided before it can be reviewed. Apparently there was no thought of considering whether the question of jurisdiction was rightly decided. That was seemingly considered out of the power of this court to inquire into.

Norton v. *Shelby County* was a writ to enforce the payment of certain bonds issued by the board of commissioners of Shelby county. One of the questions in the case was whether the board of commissioners was a legally constituted body. The Supreme Court of the State decided it was not, and this court accepted the decision as binding. "The determination made," we said through Mr. Justice Field, "relates to the existence of an inferior tribunal of the State, and that depending upon the constitutional power of the legislature of the State to create it and supersede a preëxisting institution. Upon a subject of this nature the Federal courts will recognize as authoritative the decision of the state court." *Claiborne County* v. *Brooks*, 111 U. S. 400, 410, was cited.

Smith v. *Adsit* was a suit for equitable relief against a sale of land which a third party had undertaken to make in violation of an act of Congress. A decree was entered against Adsit for $6,829 and dismissed as to other defendants. The decree was reversed by the Supreme Court of the State and the bill dismissed for want of jurisdiction, and the case was brought to this court by writ of error. A motion to dismiss was granted,

Mr. Justice Strong, speaking for the court, saying: "In view of this [the action of the state court] we do not perceive that we have any authority to review the judgment of the state court." It was intimated in the opinion that a Federal question had been presented, but it was not decided. "As we have seen," Mr. Justice Strong said, "the bill was dismissed for want of jurisdiction. The judgment of the court respecting the extent of its equitable jurisdiction is, of course, not reviewable here." And, further: "It may well have been determined that the plaintiff's remedy against Adsit was at law, and not in equity, even if the sale from Holmes was utterly void, but whatever may have been the reasons for the decision, whether the court had jurisdiction of the case or not, is a question exclusively for the judgment of the state court."

In *Callen* v. *Bransford* a writ of error to the Court of Appeals of Virginia was dismissed on the ground that that court had disposed of the case on the ground that the matters involved were purely pecuniary, and that the amount in controversy in each case was less than sufficient to give the court jurisdiction under the constitution of the State. "This being so," this court said, "we are of opinion that the writs of error to that court must be dismissed."

In *Freeport Water Company* v. *Freeport City* we said: "With what functions the Circuit Courts of the State [Illinois] may be invested may not be of Federal concern. It is also a matter of construction in which we might be obliged to follow the state courts."

In *Newman* v. *Gates* the Federal right was asserted under that provision of the Constitution of the United States requiring due faith and credit to be given by each State to the public acts, records and judicial proceedings of every other State. The Supreme Court of the State (Indiana) dismissed the appeal to it as not having been properly taken. The case was brought here but dismissed. We said, through Mr. Justice White: "As the jurisdiction of this court to review judgments or decrees of state courts when a Federal question is presented is limited to

the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a State in which a decision in the suit could be had, and, as for want of an appropriate appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting."

Chambers v. *Baltimore & Ohio Railroad Company*, 207 U. S. 142, involved a statute of Ohio giving an action for death caused by the wrongful act in another State only when the death was that of a citizen of Ohio. The statute was attacked on the ground that it violated that clause of the Constitution of the United States which entitles the citizens of each State to all the privileges and immunities of citizens in the several States. The statute was sustained by this court. Mr. Justice Moody, speaking for the court, said, p. 148:

"But, subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its court, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies and the same State may have different policies at different times. But any policy the State may chose to adopt must operate in the same way on its own citizens and those of other States. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other States is void, because in conflict with the supreme law of the land."

But in none of these cases was the same question presented that is presented here, nor were all of the cases cited by plaintiff in error to sustain the jurisdiction of this court cases in the Federal courts. *Poindexter* v. *Greenhow*, 114 U. S. 270, and *Chaffin* v. *Taylor*, 114 U. S. 309, were brought in the state courts

of Virginia, and they involve questions very much like those in the case at bar. *Poindexter* v. *Greenhow* was an action of detinue for personal property distrained by Greenhow for delinquent taxes, in payment of which Poindexter had tendered coupons cut from bonds issued by the State of Virginia under act of the State passed in 1871. This act, it was held, constituted a contract between the holder of the coupons and the State that they should be received for taxes, which contract, it was further held, was impaired by the subsequent act under which Greenhow justified the distraint of Poindexter's property.

It was urged that the action could not be maintained because it was substantially an action against the State to which it had not assented. It was further urged that the remedy was afforded of a right to recover back all the taxes after payment under protest, and that this constituted the sole remedy.

The first contention was discussed at length and rejected. The court said, in effect, that the defendant in the action was sued as a wrongdoer, and could only justify himself under a valid law. And it was said: "The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter to be taken, to be without warrant of law. *He stands then stripped of his official character, and confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense.*" (Italics ours.)

A distinction was made between the State and its government, and it was said that an officer representing and acting for the latter is not an agent of the former. That and other cases were reviewed in *Belknap* v. *Schild*, 161 U. S. 10, and Mr. Justice Gray, speaking for the court, said: "In a suit to which the State is neither formally nor really a party, its officers, although acting by its order and for its benefit, may be re-

strained by injunction, when the remedy at law is inadequate, from doing positive acts, for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion, and in violation of the Constitution or laws of the United States." Cases were cited. And again: "But no injunction can be issued against officers of a State to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced; or to compel the State to perform its obligations; or where the State has otherwise such an interest in the object of the suit as to be a necessary party." The case and those cited expose the error, which appears with a kind of periodicity, varied in presentation, to accommodate the particular exigency, that a State is inevitably brought into court when the execution of its laws is arrested by a suit against its officers. It seems to be an obvious consequence that as a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the Eleventh Amendment of the Constitution of the United States, in the national tribunals. The error is in the universality of the conclusion, as we have seen. Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation. And it will not do to say that the argument is drawn from extremes. Constitutional provisions are based on the

possibility of extremes. There need not, however, be imagination of extremes, if by extremes be meant a deliberate purpose to prevent the assertion of constitutional rights. Zeal for policies, estimable, it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as in a kind of outlawry. See *Ex parte Young, ante*, p. 123, where this subject is fully discussed and the cases reviewed.

The principles of the cases which we have cited were applied by the Supreme Court of Tennessee in *Lynn* v. *Polk*, 8 Lea, 121, where a suit against the funding board of the State was maintained against the contention that it was a suit against the State or against the officers of the State within the meaning of the act of 1873, on the ground that an officer executing an unconstitutional statute is not acting by the authority of the State. The court, however, distinguishes that case from the one at bar by saying that plaintiff in error did not assail the inspection law for being void upon its face, but only on the ground "that the oil upon which defendant was about to impose inspection fees was in law affected with interstate commerce." To enter into the inquiry involved in the contention, it was further said, "the court would be bound first to determine whether the oil in these tanks was in fact and in law, as claimed by complainant, a part of interstate commerce, and to do this we would be bound to hold, and proceed upon the theory, that the court had jurisdiction of the whole controversy." And that the court declared it was precluded from doing by the act of 1873. In other words, refused to consider that which might bring the oils under the protection of the Constitution of the United States.

A similar distinction was attempted to be made in *Poindexter* v. *Greenhow*, 114 U. S. 270, and the court replied by saying: "It is no objection to the remedy in such cases that the statute whose application in the particular case is sought to be restricted is not void on its face, but is complained of only be-

cause its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States." And inquiries of fact may be necessary to exhibit the unconstitutionality of a statute, as in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, and *Smyth* v. *Ames*, 169 U. S. 466.

It being then the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court. *Wilmington &c.* v. *Asbrook*, 146 U. S. 279.

We are brought, then, to consider whether the law would, if administered against the oils in controversy, violate any constitutional right of plaintiff in error.

As determining an affirmative answer to this question, it is contended that the oil in both tanks was in transit from the place of manufacture, Pennsylvania, to the place of sale, Arkansas. The delay at Memphis, it is urged, was merely for the purpose of separation, distribution and reshipment, and was no longer than required by the nature of the business and the exigencies of transportation. The difference in the oil in tank No. 1 and that in tank No. 2, it is further said, is that the former was sold before shipment, and the latter was to be held in Tennessee for sale, but in neither case was the oil to be sold in Tennessee, and it is hence insisted that the interstate transit of the oil was never finally ended in Memphis, but was only temporarily interrupted there.

The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is de-

fined in *Coe* v. *Errol*, 116 U. S. 517, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage. The latter is defined to be in *Brown* v. *Houston*, 114 U. S. 622, the point of time at which it arrives at its destination. But intermediate between these points questions may arise. *State* v. *Engel*, 5 Vroom (N. J.), 435; *State* v. *Carrigan*, 10 Vroom (N. J.), 35; *The Daniel Ball*, 10 Wall. 557.

In *Pittsburg Coal Company* v. *Bates*, 156 U. S. 577, coal in barges shipped from Pittsburg, Pennsylvania, to Baton Rouge, Louisiana, was stopped about nine miles above destination. It was held that it had ceased to be interstate commerce, and was subject to taxation by the State of Louisiana.

In *Diamond Match Company* v. *Ontonagon*, 188 U. S. 82, logs in transit to a point without the State were held subject to taxation under a statute of the State where they would "naturally leave the State in the ordinary course of transit."

In *Kelley* v. *Rhoads*, 188 U. S. 1, a flock of sheep driven from a point in Utah across Wyoming to a point in Nebraska for the purpose of shipment by rail from the latter point was held to be property engaged in interstate commerce and exempt from taxation by Wyoming under the statute taxing all live stock brought into the State "for the purpose of being grazed." There was no difficulty in the case except that which arose from the contention that the manner of transit was adopted as an evasion of the statute. Otherwise the grazing of the sheep was as incidental as feeding them would be if transported by rail. The pertinence of the case to the present controversy is in its summary of the principles of prior cases expressed in the following passage: "The substances of these cases is that, while property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce and is exempt from local assessment." Property, therefore, at an intermediate point between the place of

shipment and ultimate destination may cease to be a subject of interstate commerce. Necessarily, however, the length and purpose of the interruption of transit must be considered.

In *State* v. *Engle, Receiver, &c.*, 5 Vroom (N. J.), 425, 435, coal mined in Pennsylvania and sent by rail to Elizabethport, in New Jersey, where it was deposited on the wharf for separation and assortment for the purpose of being shipped by water to other markets for the purpose of sale, it was held that the property was not subject to taxation in New Jersey. The court said: "Delay within the State, which is no longer than is necessary for the convenience of transhipment for its transportation to its destination, will not make it property within the State for the purpose of taxation." See also in *State* v. *Carrigan*, 10 Vroom (N. J.), 36, where coal also shipped from Pennsylvania to a port in New Jersey and remaining there no longer than was necessary to obtain vessels to transport it to other places was held to be in course of transportation and not subject to the taxing power of the State. In *Burlington Lumber Co.* v. *Willetts*, 118 Illinois, 559, the principle was recognized that property *in transitu* was not subject to the taxing power of a State, but it was held that logs in rafts sent from Wisconsin to Burlington, Iowa, by the Mississippi River, a part of which were stopped at a place in Illinois called Boston Harbor, to be there kept until needed at Burlington for mill purposes, were subject to taxation. The court said that the property was "kept at New Boston on account of the profit of the owners to keep it there;" and further, that the company was engaged in business in the State beneficial to itself, and its property was so located as to claim the protection of the laws of the State and hence was liable to taxation.

Like comment is applicable to plaintiff in error and its oil. The company was doing business in the State, and its property was receiving the protection of the State. Its oil was not in movement through the State. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as

in *State &c.* v. *Engle, supra,* but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage. The bill takes pains to allege this. "Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary, in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil."

This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the State and for which the protection of the State is necessary, a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500.

We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U. S. 345, 356. The difference, if any exists, it is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit; in other words, show that its oil was not property in interstate commerce.

As our conclusion is that no constitutional right of the oil company was violated by the enforcement of the law of 1899, it follows that no error prejudicial to the company was committed by the Supreme Court of Tennessee, and, for the reasons stated, its judgment is *Affirmed.*

MR. JUSTICE HARLAN, concurring.

The fundamental question before the state court of original jurisdiction was whether it had jurisdiction, under the constitution and laws of Tennessee, of a suit like this. Manifestly, if that court was forbidden by the laws under which it was created to take cognizance of cases like this, it had no alternative but to dismiss this suit. The court overruled a demurrer to the bill, one of the grounds of demurrer being that the suit was one "against the State or against an officer of the State, acting by authority of the State with a view to reach the State, its treasury, funds or property." It thereby sustained its jurisdiction, and proceeded to a decree on the merits. The case being carried to the Supreme Court of Tennessee, that court reversed the judgment and held that no court of Tennessee could, *under its statutes*, take cognizance of this suit and give the decree asked. Upon that ground it did what it said the inferior state court should have done, namely, dismissed the suit for want of jurisdiction to give the relief asked.

The statute of Tennessee which the Supreme Court of that State construed and held to be prohibitory of this suit was an act passed February 28, 1873, c. 13, p. 15. It provides: "That no court in the State of Tennessee has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the State, or any officer acting by the authority of the State, with a view to reach the State, its treasury, funds or property, and all such suits now pending, or hereafter brought, shall be dismissed as to the State, or such officer, on motion, plea or demurrer of the law officer of the State, or counsel employed by the State."

The oil company seeks a reversal of the decree of the state court, contending that it was denied a right arising under the commerce clause of the Constitution. But back of any question of that kind was the question before the Supreme Court of Tennessee whether the inferior state court, under the law of its organization, that is, under the law of Tennessee, could

entertain jurisdiction of the suit. The question, we have seen, was determined adversely to jurisdiction. That certainly is a state, not a Federal question. Surely, Tennessee has the right to say of what class of suits its own courts may take cognizance, and it was peculiarly the function of the Supreme Court of Tennessee to determine such a question. When, therefore, its highest court has declared that the Tennessee statute referred to in argument did not allow the inferior state court to take cognizance of a suit like this, that decision must be accepted as the interpretation to be placed on the local statute. Otherwise, this court will adjudge that the Tennessee court *shall* take jurisdiction of a suit of which the highest court of the State adjudges that it cannot do consistently with the laws of the State which created it and which established its jurisdiction. It seems to me that this court, accepting the decision of the highest court of Tennessee, as to the meaning of the Tennessee statute in question, as I think it must, has no alternative but to affirm the judgment, on the ground simply that the ground upon which it is placed is broad enough to support the judgment without reference to any question raised or discussed by counsel.

What is said in the opinion of the court about the Eleventh Amendment, is, I submit, entirely irrelevant to any decision of the present case by this court. That Amendment relates wholly to the judicial power of the United States, and has absolutely nothing to do with the inquiry as to the jurisdiction of the inferior state court under the Tennessee statute of 1873. In determining what relief this court can or should give, in respect of the judgment under review, we need not consider the scope and meaning of the Eleventh Amendment; for, it was long ago settled that a writ of error to review the final judgment of a state court, even when a State is a formal party and is successful in the inferior court, is not a suit within the meaning of the Amendment. *Cohens* v. *Virginia*, 6 Wheat. 264, 408, 409.

In my opinion, the decision of the Supreme Court of Tennessee, that the inferior state court was forbidden by the law of

its being from taking cognizance of this suit, is conclusive here, and the judgment of that court should, therefore, be affirmed without reference to any other question raised or discussed.

Mr. Justice Moody, dissenting.

I am unable to agree to the judgment in this case, for the reason that the statute here in question, as it was enforced against the property of the plaintiff in error, in my opinion was an interference with interstate commerce, which was beyond the power of the State. It is to be observed that the court below did not construe the statute as applying to articles in the course of transportation between the States and not destined for sale to consumers in the State, or, in other words, the court did not hold that the statute applied to the property here affected by it. On the contrary, the court expressly refrained from passing upon the merits of the controversy, and dismissed the bill for want of jurisdiction. We, however, have assumed jurisdiction of the controversy, for reasons given in the opinion of the court, in which I concur, and therefore cannot escape the duty of interpreting the meaning of the statute. I think we should, if it be possible, give to the statute a meaning which places its constitutionality beyond doubt. The law seems clearly to be designed to protect state manufacturers and consumers within the State. Its operation is limited by the words of the first section, which directs the Governor to appoint inspectors for illuminating fluids "which may be manufactured or offered for sale in the State." Far from enlarging the meaning of these restrictive words, the other provisions of the law accord with and confirm them. The oil in tank No. 1 at least, which was neither manufactured in the State nor offered for sale in the State, is by this interpretation removed from the operation of the statute, and I think we ought so to decide.

But, if it be assumed that the oil in tank No. 1 is subjected to inspection by the law, in my opinion the law is unconstitu-

tional. The law is not sustained by the judgment of the court as an inspection law, which it purports to be. Perhaps it could not be under the doctrine announced and applied in *Minnesota* v. *Barber*, 136 U. S. 313, and *Brimmer* v. *Rebman*, 138 U. S. 78. I am therefore relieved from considering whether the law, because it is a mere cloak for exacting revenue from interstate commerce, is bad as an inspection law. The judgment of the court treats it as such, and it is sustained not as an inspection but as a revenue law. I do not dissent from such an interpretation of its effect. But, with unfeigned deference to the opinions of my brethren, I venture to think that the statute, as enforced in the case at bar, is bad as a taxing law. The case of *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, holds that articles before they have ceased to be the subjects of interstate commerce may still be reached by the taxing power of the State. Accordingly it was held that the property of a citizen of another State which had been brought into the State of Tennessee, placed in a warehouse for sale, and from there sold to persons within as well as without the State, was subject to a state tax. It was observed in the opinion in that case that the property had come to rest in the State and was enjoying the protection of its laws. But the case at bar, so far as it concerns the oil in tank No. 1, to which I confine my observations, is sharply distinguished from that case. The judgment here takes a step forward which I think ought not to be taken. The oil in that tank had been sold while in Pennsylvania and Ohio to purchasers in other States than Tennessee, before it started in the course of interstate transportation. It was shipped especially in pursuance of such sales. It was in Tennessee only momentarily ("a few days"), for the purpose of repacking and reshipping it, and for no other purpose whatever. The delay was to meet the exigencies of interstate commerce, which arose out of the nature of the transaction. It does not seem to me important, if such be the case, that it would begin the remainder of its interstate journey under a new contract of shipment. It would no more seem to be the subject of state taxation than

a drove of cattle, whose long interstate journey was interrupted, for humane reason, to give them a few days of rest and refreshment. With respect to this oil, no business whatever was done in the State except that which was required to conduct the transaction of interstate commerce begun in another State and to be completed in a third State. The single consideration that the property enjoys in Tennessee the protection of the laws of the State cannot be enough to justify state taxation. If that were so, all property in the course of interstate transportation would be subject to state tax in every State through which it should pass. I conclude that the oil in question was actually in the course of transportation between the States, was delayed in the State of Tennessee only for the purpose of conveniently continuing that transportation, and was, therefore, protected from state taxation by the commerce clause of the Constitution. *Coe* v. *Errol*, 116 U. S. 517, 525; *Kelley* v. *Rhoads*, 188 U. S. 1. Cases of taxation upon property before it has entered the channels of interstate transportation, or after the transportation has finally ended, seem to me to have no application. In the former class the property is taxable because it has not ceased to be a part of the mass of the property of the State, and in the latter class because it has come to rest as a part of the mass of the property of the State. Between those two points of time it is exempt from the taxing power of the State. In every case where the tax has been sustained there were facts present regarded as essential by the court, which are absent here. The property had either not began its interstate journey, as in *Coe* v. *Erroll*, *ub. sup.*, and *Diamond Match Company* v. *Ontonagon*, 188 U. S. 82, or it had ended that journey and was held for sale in common with other property in the State, as in *Brown* v. *Houston*, 114 U. S. 622; *Pittsburg Coal Company* v. *Bates*, 156 U. S. 577, and *American Steel & Wire Company* v. *Speed*, *ub. sup.*

Mr. Justice Holmes concurs.